An Update on Michigan Sentencing Law & Procedure Seminar & Webcast

September 28, 2004
Michigan Hall of Justice
Lansing, Michigan

The Implications of *Blakely v Washington* and *People v Claypool* on Michigan Sentencing

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◆Impact of Blakely v Washington on Michigan Sentencing Procedures:

Blakely v Washington, 542 US ___; 124 S. Ct. 2531 (June 24, 2004)

Defendant Blakely pleaded guilty to the kidnapping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the Court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with deliberate cruelty.

The Supreme Court considered whether this sentence violated the petitioner's Sixth Amendment right to trial by jury.

Applying Apprendi v New Jersey, 530 US 466; the Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.

The Court in Blakely stated "Our precedents made clear, however, that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"

"In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment', Bishop, supra § 87, at 55 and the judge exceeds his proper authority."

At Note 8, the Court stated "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely allow it,

◆ People v Claypool, 470 Mich 715 (2004)

The issues in Claypool:

"Whether "sentencing manipulation" or "escalation" is a substantial and compelling reason justifying a downward departure from a statutorily imposed mandatory minimum sentence, and whether a trial court may consider the legislative sentencing guidelines recommendation when determining the degree of a departure, which has already been determined to be supported by substantial and compelling reasons."

The opinion in Claypool in Note 14 found that the Michigan system of sentencing is unaffected by the holding in Blakely that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment. Not all of the justices joined in this conclusion; however, a majority did agree with this statement.

The application of Claypool to sentencing guidelines:

> "The trial court in this case concluded, without more, that the defendant was 'escalated.' It is not clear whether the court was thinking about defendant's intent or the police conduct. Thus, resentencing or rearticulation of the court's reasons for departure on this factor is required because, under MCL 769.34(3), 'it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record.' *Babcock, supra* at 258 (emphasis in original). Moreover, a trial court must articulate on the record a substantial and compelling reason why its *particular* departure was warranted. *Id.* at 259-260. The trial court is instructed to do this on remand."

the verdict alone does not authorize the sentence."

Blakely expressed no opinion on the Federal Sentencing Guidelines. The United States Court of Appeals for the Sixth Circuit has joined other circuits in holding that Blakely does not compel the conclusion that the Federal Sentencing Guidelines violate the Sixth Amendment. United States of America v Koch, 2004 Fed App 0284P (6th Cir., August 26, 2004)

Is the 'statutory maximum' the sentencing range enacted by Congress or the sentencing range promulgated by the Sentencing Commission? The 6th Circuit in Koch recognized the logic of this issue because the federal guidelines require federal judges to find facts that will increase individual sentences. This issue is currently scheduled for oral arguments before the United States Supreme Court in two different cases. United States v Booker, 2004 WL 1713654 (Aug. 2, 2004); United States v Fanfan, 2004 WL 1713655 (Aug. 2, 2004).

In People v Barbee, 470 Mich 283 (2004) the Michigan Supreme Court held: "Conduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable. Accordingly, we affirm the trial court's assessment of ten points for OV 19 because defendant's conduct constituted interference with the administration of justice."

Will the holding of Blakely and Footnote 8 have an impact on People v Barbee?

How are scoring errors reviewed on appeal?

MCL 769.34(10): If a minimum sentence is within the appropriate guidelines sentence range, the Court of Appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guideline sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals.

People v Kimble, 470 Mich 305 (2004) held that Section 10 of the sentencing guidelines controlled over the then existing MCR 6.429(C) and allowed review of a sentence outside the appropriate guideline range even though the issue had not been raised at sentencing. If the issue was not raised at sentencing or in a motion for resentencing, the defendant must satisfy the plain error standard established in People v Carines, 460 Mich 750 (1999).

MCR 6.429(C) was amended with immediate effect on June 29, 2004 to conform the court rule to MCL 769.34(10). ADM File No. 2004-15.

Is the fact finding authority granted to judges under Michigan's statutory sentencing guideline scheme impacted by the Blakely decision and the Sixth and Fourteenth Amendments of the United States Constitution?

This is an open question that will be determined by the United States Supreme Court and/or Michigan Appellate Courts. Trial courts have been reminded by the Michigan Supreme Court that the courts of Michigan are obligated to apply a statute as construed by the Michigan Supreme Court, any

lower federal court opinions to the contrary notwithstanding. People v Harris, 470 Mich 882 (2004). A United States Supreme Court decision interpreting the Federal Constitution is, of course, binding on all courts. The answer to the questions posed by Blakely await a decision by the United States Supreme Court.

Pending resolution of these issues by appellate courts, the obligation of a trial judge as a sentencing judge was succinctly stated by the federal district judge who sentenced the defendant Fanfan:

> "I think that as the trial judge, sentencing judge, my obligation is to go ahead and do the best I can with the Supreme Court decision. This case itself has already had at least a couple of rounds of sentencing briefing, and I think it would not be appropriate to delay further. So I'm going to go ahead and rule based on my understanding of what the Blakely decision means."

Suggestions to Address Blakely and Sentencing Issues:

- Select a case which adequately presents the issue or issues to be addressed,
- Impose a sentence and articulate a basis for an alternative sentence,
- Require specificity from parties to the lawsuit in framing the issue or issues,
- Require briefs on the issue,
- Make a complete record,
- Fully articulate the reasons for your decision,
- Communicate with your colleagues. Michigan Judges Association E-mail Listserv: MSCAO-MJA@listserv.michigan.gov

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The Implications of *Blakely v Washington* and *People v Claypool* on Michigan Sentencing

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A MICHIGAN DEFENSE PERSPECTIVE ON BLAKELY V WASHINGTON

The defendant submits that the scoring of certain Offense Variables on the basis of factual findings or conclusions that were not submitted and proved to a jury beyond a reasonable doubt nor admitted by a plea, and the resulting enhancement of the appropriate sentencing guidelines range represents an unconstitutional violation of his Sixth Amendment right to jury trial. Blakely v Washington, 542 US ___; 124 S Ct 2531; ___ L Ed 2d ___ (2004), and an unconstitutional denial of due process of law under Apprendi v New Jersey, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) as interpreted in Blakely.

Under Blakely, where further fact-finding is legislatively required before a sentence can be increased – by increasing the guidelines range, departing from the guidelines, or otherwise – a criminal defendant has a due process right to a jury determination of those facts beyond a reasonable doubt unless those facts are admitted by the defendant. US Const, Ams VI, XIV. In this case, the legislatively authorized range of punishment was impermissibly increased because the trial judge scored certain variables of the statutory sentencing guidelines and increased the permissible range on the basis of findings that were not reflected in a jury verdict nor admitted by the defendant in a plea.

In Blakely, the United States Supreme Court held that the defendant's sentence was constitutionally invalid. Blakely had pled guilty to an offense punishable by no more than ten years in prison. However, other statutes – namely the sentencing guidelines – also limited the range of sentences a judge could impose. A judge could exceed the standard guidelines range for "substantial and compelling reasons." In Blakely's case,

the standard range was 49 to 53 months. The judge imposed an exceptional sentence of 90 months after finding that Blakely had acted with "deliberate cruelty." Blakely, [2-3]. Applying the principles set forth in Apprendi v New Jersey, *supra* and its progeny, the Supreme Court found this sentence invalid because the judge increased the penalty for the crime based on facts that had neither been submitted to a jury nor proven beyond a reasonable doubt. Blakely, [7-9].

Blakely addressed a departure above a standard or appropriate guidelines range. Here defendant complains about the improper enhancement of the statutory sentencing guidelines range itself. He submits that there is no question but that Blakely prohibits such an unconstitutional enhancement of the appropriate range in the first instance. A sentence is invalid not only where it represents a departure from a legislative guidelines range premised on facts not found by a jury nor admitted by the defendant, but when a sentence is within a legislative guidelines range enhanced itself on facts not found by a jury nor admitted by the defendant. Scoring legislative guidelines to increase the appropriate range of punishment is constitutionally indistinguishable from departing above a scored range. For example, in United States v Ameline, ___ F3d ___ (CA9, 2004)(No. 02-30326, 7-21-04), the Ninth Circuit plainly held:

> "We hold that Blakely's definition of statutory maximum applies to the determination of the base offense presumptive ranges under Sec 2D1.1(c) of the Sentencing Guidelines, as well as to the determination of the applicability of an upward enhancement under Sec 2D1.1(b)(1)."
> Slip op pp 2-3.

See also United States v Mooney, ___ F3d ___ (CA8, 2004)(#02-3388, 7-23-04) [majority finding that the federal sentencing guidelines are unconstitutional because they

compelled the scoring of the guidelines base level by findings based on a preponderance of the evidence in violation of Blakely.][1]

Defendant does not claim that the entire Michigan statutory sentencing guidelines scheme is unconstitutional. Nor did the Blakely Court hold the entire Washington state guidelines scheme unconstitutional. Defendant does submit, consistent with the conclusion in Ameline above, that Blakely and Apprendi apply to and limit the scoring of the guidelines variables in a manner that enhances the appropriate guidelines sentence range.

Defendant recognizes that a majority of the Supreme Court took a position in People v Claypool, 470 Mich 715, 730 n 14 (2004) that Blakely did not affect Michigan's sentencing scheme because we have an "indeterminate" sentencing system where the maximum sentence is set by law. That "position" is clearly dicta because the issue presented and decided in Claypool was the rationale for a downward departure from a drug mandatory minimum sentence, and Blakely has no application to mandatory minimum sentences. See Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed

[1] The federal circuits as of this writing appear evenly split on whether Blakely applies to the federal sentencing guidelines. In addition to the Eighth and Ninth Circuits noted here, the Seventh Circuit has also held that Blakely applies to the federal sentencing guidelines. The Fourth, Fifth and Sixth Circuits have held it does not. United States v Pineiro, ___F3d ___ (CA5, 2004)(#03-30437, 7-12-04); United States v Koch, ___ F3d ___ (CA6, 2004)(#02-6278, 8-26-04), United States v Hammoud, ___ F3d ___ (CA4, 2004)(#03-4253, 8-2-04), *Op. To be issued later*. The United States Supreme Court has granted *certiorari* on the question. United States v Booker and United States v Fanfan, (U.S. Aug. 2, 2004)(Nos. 04-104, 04-105).

2d 524 (2002). But with due respect, Defendant submits that that "position" is untenable.[2]

The Blakely majority rejected the idea that the "statutory maximum" to which Apprendi applied was limited to the absolute maximum specified in the penal statute: "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Id. at 7; emphasis in original. Blakely is consistent with Apprendi, a case that requires jury-proof of all facts that expose a defendant to "greater or additional punishment" outside "the range prescribed by statute." Apprendi at 481, 486.

In light of Blakely and Apprendi, a sentence is invalid not only when a judge departs from a legislative guidelines range, but also when a judge sentences a defendant within a range that was determined by facts neither admitted by the defendant nor found by a jury beyond a reasonable doubt. In either case, the judge has impermissibly exceeded the legislatively prescribed range of punishment (i.e., that described by the lowest sentencing grid that can be constructed by facts necessarily found by the jury or admitted by the defendant in his plea).

It cannot be argued under Michigan precedent that imposing a sentence that is a departure above the statutory sentencing guidelines range or a sentence that is a departure above the correct statutory sentencing guidelines range is anything other than increasing the penalty beyond the statutorily prescribed range. See People v Kimble, 470 Mich 305,

[2] The Honorable Timothy Pickard of the Lenawee County Circuit Court held on August 27, 2004 that the Michigan statutory sentencing guidelines were unconstitutional under Blakely. Defendant submits that just as the United States Supreme Court did not declare the Washington state guidelines unconstitutional in their entirety, this Court need not do so either. Blakely simply constitutionally sets the method and standard of proof for scoring and departing above the guidelines, and does not prohibit outright any scoring or departure. The Michigan statutory guidelines do not themselves describe the method and standard of proof: now Blakely sets those parameters as a matter of constitutional law.

313, n5 (2004) (describing a five-year departure from the appropriate guidelines range as "sending a person to prison for a term several years in excess of what is permitted by the law"). In Michigan, one of the "outer limits" is set by the penal code (the absolute maximum) and the other by the sentencing guidelines statutes (the maximum minimum), both of which describe the sentence and both of which legislatively constrain "judicial power to impose" that sentence. See Harris, *supra*, 153 L Ed 2d at 544.

The Michigan Supreme Court's conclusion recited in Claypool that Blakely does not apply because Michigan is an "indeterminate" sentencing state is not only a semantic distraction, but misses the substance of the real discussion in Blakely.[3] It is true that there is language in part IV of the Blakely opinion that excludes from its protections "indeterminate sentencing" schemes. Blakely, [12-13]. One might in reading the opinion make the erroneous assumption that Michigan is, therefore, exempt because its sentences are "indeterminate" – because they are described by two numbers (a "maximum" and a "minimum") rather than one. The flaw with this position is that it inappropriately reads the language of a United States Supreme Court opinion as if it were written by a

[3] The Supreme Court in Claypool certainly gave short shrift to a United States Supreme Court opinion of unparalleled constitutional magnitude regarding sentencing law, and made no reasoned reply to the recognized concerns that the Michigan guidelines are suspect. See Blakely v Washington, *supra*, O'Connor, J., dissenting [noting Michigan implicated]; "Blakely v Washington: Implications for State Courts (National Center for State Courts, July 19, 2004) [Michigan may be affected]; "Aggravated Sentencing: *Blakely v. Washington*, Practical Implications for State Sentencing Systems", Policy and Practice Review (August 2004, Vera Institute of Justice State Sentencing and Corrections) [Michigan may be affected]. The Court of Appeals has since granted leave to file a supplemental brief raising Blakely in People v Ossowski, Court of Appeals 246667, Order of Chief Judge Whitbeck, 8-20-04.

Michigan practitioner, contemplating the terminology as criminal justice practitioners in Michigan would traditionally understand them.[4]

"Indeterminate" in Justice Scalia's parlance describes a system of unconstrained sentencing discretion, as opposed to a "determinate" one in which the legislature has conditioned a sentence on certain findings of fact. Thus, the reason that the scheme in Williams v New York, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949) was "indeterminate" was because the judge could have sentenced the defendant to death without giving any reason whatsoever. Blakely, [8].

Simply put, Michigan's sentencing scheme is "determinate" in the parlance of Blakely, because the legislative scheme specifies facts which determine what one's sentence will be – albeit in two places: the penal code section criminalizing the base offense, and the statutes setting forth the guidelines variables and ranges.[5] It is a system of tightly constrained discretion, unlike the wide open "indeterminate" systems referenced by the justices in Blakely which give judges unfettered discretion to impose a sentence up to the penal code maximum.

Blakely applies to all cases where the judgment is not final. See Schriro v Summerlin, ___ US ___; 124 S Ct 2519; ___ L Ed 2d ___ (2004) (holding Ring v Arizona, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) applicable to all cases pending on direct review); Griffith v Kentucky, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987) (even new procedural rules apply to all cases still pending on direct review); Blakely, [11] (O'Connor, J., dissenting) ("Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy," specifically referencing Michigan's statutory guidelines); United States v Ameline, *supra*. The Judgment in the case at bar remained subject to direct appellate review on June 24, 2004, the da

[4] Even using traditional Michigan legal lexicon, the Michigan statutory sentencing guidelines provide for numerous "determinate" sentences as recognized by Judge Pickard.

[5] In United States v Koch, *supra,* note 10, the Sixth Circuit held that Blakely did not render the federal sentencing guidelines unconstitutional. The Koch majority found, however, that Blakely did not impact the federal sentencing guidelines because those guidelines are not statutory but rather "agency-promulgated rules". The Michigan state guidelines are, in contrast, clearly statutory.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN ALLEN KRAUSE,

Defendant-Appellant.

UNPUBLISHED
August 10, 2004

No. 246896
Grand Traverse Circuit Court
LC No. 02-008996-FC

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

I. Overview

A jury convicted defendant Shawn Allen Krause of third-degree criminal sexual conduct[1] and providing alcohol to a minor.[2] The trial court sentenced him as a fourth habitual offender[3] to 7 to 20 years' imprisonment for the CSC conviction and sixty days' imprisonment for the conviction of providing alcohol to a minor, to be served concurrently. He appeals as of right. We affirm.

II. Basic Facts And Procedural History

This case arises from events that took place at a party in July 2002. The party was at the home of the complainant's friend, whose mother, Mary VanWagoner, had rented a room to Krause. The complainant was thirteen years old at the time. The complainant testified at trial that Krause, then twenty-nine years old, and a friend provided alcoholic beverages to her and some of her peers, and that the complainant then, while intoxicated, accepted Krause's invitation to have sexual intercourse. Several others who were at the party testified that the complainant and Krause admitted that they had sex, and that Krause asked those at the party not to tell VanWagoner about it. Krause did not testify. The jury found Krause guilty of third-degree criminal sexual assault and providing alcohol to a minor.[4]

[1] MCL 750.520d(1)(a).

[2] MCL 436.1701(1).

[3] MCL 769.12.

[4] There was also evidence that Krause engaged in sexual activity with the homeowner's fourteen-year-old daughter at the party. Krause was charged with assault with intent to commit second-degree criminal sexual conduct in that matter, but the jury found him not guilty.

III. Reference to a History of Imprisonment

A. Standard Of Review

We review constitutional issues de novo,[5] but because no objection was made to the challenged testimony, we will reverse only for plain error that affected substantial rights.[6]

B. Testimony

Krause asserts that the admission of testimony that Krause had been in prison previously denied him a fair trial. We disagree.

Before trial, the trial court told the attorneys that it would "require that the references regarding 'back to prison' . . . not be solicited from witnesses on the stand," but added, "Testimony about 'I wouldn't want to go to prison' . . . that's fine." The prosecutor assured the court that he had instructed all of his witnesses "not to mention that the Defendant has any criminal conviction, that he's been to prison."

However, at trial, when the prosecutor asked one of the youths who had been at the party why he initially agreed not to tell anyone that Krause had sex with the complainant, the witness replied, "because [defendant] said that he didn't want to go back to—or go to prison." Discussing the incident later in chambers, the trial court stated that this testimony, "although he did try to correct it, was without question a violation of the Court's preliminary ruling." However, the trial court further noted that a juror had coughed just when the improper testimony was coming in, causing the trial court to doubt that the jury heard it clearly. The trial court offered to provide a curative instruction, but defense counsel declined on the ground that he wished not to emphasize the irregularity that way. Krause points to no other occasion when the jury heard of his record of prior imprisonment.

The potential prejudice from bringing a defendant's earlier imprisonment to his jury's attention is obvious.[7] However, not every instance of mention before a jury of some inappropriate subject matter warrants a new trial.[8] A criminal defendant is entitled to a fair trial, not a perfect one.[9] Specifically, "an unresponsive, volunteered answer to a proper question" does not normally require a new trial.[10] Further, the trial court specifically found that the prosecutor was blameless in this situation, and Krause does not assert otherwise in his brief on appeal. Finally, we are not convinced that this brief and isolated remark affected Krause's substantial rights.

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[5] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[6] *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999).

[7] See *People v Allen*, 429 Mich 558, 568-569; 420 NW2d 499 (1988).

[8] *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

[9] *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

[10] *Haywood*, *supra* at 228.

Under these circumstances, the allusion to Krause's prior imprisonment does not require reversal.

IV. Effective Assistance of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact, which we review for clear error, and constitutional law, which we review de novo.[11] In this case, our review is limited to the facts on the record because the trial court did not hold an evidentiary hearing.[12]

B. Failure To Object

Krause argues that defense counsel was ineffective for failing to request a mistrial in response to the improper testimony. To establish ineffective assistance of counsel, the defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.[13] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[14] To show an objectively unreasonable performance, the defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[15] In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.[16] The defendant must also show that the proceedings were "fundamentally unfair or unreliable."[17]

We conclude that Krause has not established that his counsel was ineffective under these standards for failing to request a mistrial. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial."[18] As discussed above, the mishap in question was minor, and of little potential prejudice to Krause. Accordingly, defense counsel could not reasonably have supposed that the trial court would have

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[11] *LeBlanc*, *supra* at 578.

[12] *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

[13] *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314, 318; 521 NW2d 797 (1994).

[14] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[15] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

[16] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[17] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[18] *Haywood*, *supra* (citations omitted).

looked favorably upon a motion for a mistrial. Counsel is not obliged to argue futile motions.[19] We conclude that Krause's claim of ineffective assistance of counsel is without merit.

V. Witness Tampering

A. Standard Of Review

We review the trial court's decision to allow the testimony of a witness who violated a sequestration order for an abuse of discretion.[20]

B. Influencing A Sequestered Witness

Krause argues that he was denied a fair trial because a spectator apparently endeavored to apprise one or two prosecution witnesses of preceding testimony, thus potentially influencing their own. We disagree.

At the start of proceedings, the trial court ordered that the witnesses be sequestered. However, during a break in the proceedings, after the complainant had testified, defense counsel informed the trial court that a defense witness had reported that she overheard a spectator, apparently the father of the alleged victim of the assault with intent to commit CSC, talking to the owner of the house where the party took place about the testimony that had been presented. Defense counsel's understanding was that "there were statements made about this is how [the alleged assault with intent victim] needs to make sure this is how her testimony is based upon what [the complainant] had to say." The prosecutor responded that he had made inquiry, and learned that the spectator was "apparently coaching another witness what to say or coaching a mom what to tell her daughter to say," but added that the spectator himself denied it. The trial court encouraged the attorneys to try to ascertain whether the alleged assault victim, who was to testify next, had indeed been tainted, then admonished the spectators to refrain from talking to any witnesses about what was taking place at trial. The alleged assault victim then testified without objection.

"[T]rial courts have discretion to order sequestration of witnesses and discretion in instances of violation of such an order to exclude or to allow the testimony of the offending witness."[21] When a court fails to exercise discretion if properly asked to do so the court abuses that discretion.[22] However, no such request was made in this instance. Although defense counsel brought the suspicions of tampering to the trial court's attention, he requested no specific remedy. Because the alleged assault victim proceeded to testify without objection, appellate objections are forfeited. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and we will reverse only when the defendant is actually

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[19] See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

[20] See *People v Nixten*, 160 Mich App 203, 209; 408 NW2d 77 (1987).

[21] *Nixten*, *supra* at 209.

[22] See *People v Stafford*, 434 Mich 125, 134; 450 NW2d 559 (1990).

innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[23]

Krause implies that the alleged assault victim's father conspired with that witness to have her corroborate the complainant's testimony. However, as the trial court observed, the alleged assault victim may have been sympathetic to Krause, and in any event tended to minimize his misconduct. In fact, that witness' major role at trial was to provide the evidence behind the assault charge stemming from Krause's alleged improper touching of her, of which the jury found Krause not guilty. That witness' corroboration of the complainant's testimony concerning Krause's conduct with the latter was cumulative to the complainant's own direct and unambiguous account of Krause's criminal actions against her. Assuming arguendo that this witness' testimony should have been barred, its admission was of little consequence in connection with the charges of which Krause was convicted. Competent testimony that is duplicative of improperly admitted testimony can militate against the conclusion that a party was harmed by the error.[24]

For these reasons, even assuming that a spectator did indeed approach the mother of a witness in hopes of persuading her to influence that witness, we cannot conclude that any such improper influence actually reached that witness in fact or, if it did, that it actually influenced her testimony. To the extent that the trial court erred in failing, sua sponte, to deliver factual findings and legal conclusions on this matter, the error did not affect defendant's substantial rights. Accordingly, we conclude that reversal is not warranted on this ground.

VI. Prosecutorial Misconduct

A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.[25] If no objection was made to the challenged remarks, we will reverse only for plain error, placing the burden on the defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.[26] Moreover, if a curative instruction could have alleviated the prejudicial effect of the challenged remarks, error requiring reversal did not occur.[27]

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[23] *Carines*, *supra* at 763.

[24] See, e.g., *People v McRunels*, 237 Mich App 168, 185; 603 NW2d 95 (1999).

[25] *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[26] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines*, *supra* at 752-753, 764; 597 NW2d 130 (1999).

[27] *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

B. Vouching

Krause argues that the prosecutor engaged in improper vouching when he attempted to explain inconsistencies in his witnesses' testimony by reminding the jury that one could hardly expect several teenage witnesses to provide identical accounts of what happened at a drinking party months after the fact. The prosecutor suggested that it would have been a matter of concern if they had all presented matching stories, because "that's not what happens in the real world, that's not the truth." The prosecutor added, "The truth is that people hear and see things differently . . ." These remarks drew no objection.

"Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness."[28] The critical inquiry is whether the prosecutor urged the jurors to suspend their own judgment out of deference to the prosecutor or police.[29]

We reject the assertion that the prosecutor's argument in this case was improper. Our reading of the challenged comments indicates that the prosecutor was merely urging the jury to call upon everyday experience and common sense, not suggesting that he had some special knowledge concerning the truthfulness of his witnesses. Accordingly, we conclude that these remarks were not improper.

Krause next makes issue of the prosecutor's having argued that where other witnesses remembered the date upon which they spoke to the police, but one did not, this was "not an important fact," continuing, "No one in this case had a reason to lie about when they talked to the police." However, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence.[30] The prosecutor's argument was a fair characterization of the evidence, presented with no hint of vouching. The same analysis applies to Krause's attempt to make issue of the prosecutor's having argued that the defense witnesses had some bias or interest in the outcome. In the course of making this argument, the prosecutor nowhere hinted that he had personal insights into any witness' character for truthfulness. Accordingly, Krause fails to show that any improper vouching took place.

C. Appeal to Sympathy

It is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim.[31] As an example of both improper vouching and improper appeal to sympathy, Krause points to the prosecutor's statement, "If [the complainant] is making this up, what does she have to gain?" followed by his pointing out that the victim had to confess to her father that

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[28] *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

[29] *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

[30] *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987).

[31] See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

she had sex with a twenty-nine-year-old man, then inform an assembly of strangers that "'after I had consensual sex with a twenty-nine-year-old man I was bleeding from my vaginal area.' That's what she got out of this." But these remarks, which drew no objections, ran afoul of neither stricture.

Again, the prosecutor is free to argue credibility from the evidence.[32] And although the prosecutor necessarily touched on subject matter that was apt to arouse some juror sympathy, this was closely bound up with the credibility question. However, argument likely to stir sympathies is not prejudicial where, as here, the bulk of the prosecutor's arguments were properly tied to the evidence and applicable law.[33] This is especially so where, as here, the trial court instructed the jury not to let sympathy influence its verdict. Accordingly, we conclude that there was no error requiring reversal.

D. Burden Shifting

"[T]he presumption of innocence is 'at the core of our criminal process . . . .'"[34] Similarly fundamental is that the presumption of innocence can be overcome only by proof beyond a reasonable doubt of every element of every offense.[35] The prosecutor bears the burden of proof in a criminal case; therefore, the prosecutor may not argue to the jury that the defendant failed in some duty to prove his or her innocence.[36] By logical extension, a prosecutor also may not suggest that his burden of proof is less than beyond a reasonable doubt.

Krause argues that the prosecutor violated these principles with the following argument in rebuttal:

> I'm still waiting to hear why, after [defense counsel's] closing. I'm still waiting for that answer, why would seven or eight people come in here and concoct this bizarre story, take the time and energy to do that? There is no explanation and there hasn't been any explanation that's come from that witness chair . . . .

With these remarks, which drew no objection, the prosecutor was responding to defense counsel's admonishments to the jury to resolve credibility contests in favor of the defense witnesses. "[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate

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[32] *Smith*, *supra*.

[33] See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988).

[34] *People v Saffold*, 465 Mich 268, 276; 631 NW2d 320 (2001), quoting *In re Guilty Plea Cases*, 395 Mich 96, 125; 235 NW2d 132 (1975).

[35] See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

[36] See *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987).

theory cannot be said to shift the burden of proving innocence to the defendant."[37] Defense counsel, by obvious implication, suggested that the prosecutor's witnesses were lying in the important particulars, thereby opening the door to rebuttal emphasizing that defense counsel offered no motive or other explanation for such concerted untruthfulness. This was reasonable argument from the evidence; it did not shift the burden from the prosecution to the defense.[38]

Krause also makes issue of the following excerpt of the prosecutor's closing:

> [Defense counsel] told you, "Well, we don't have a different standard of credibility, because people are younger." Well, in a way we do, because the judge is going to tell you you take into account a witness' age and maturity in deciding, you know, what you believe about their testimony. Because younger people don't carry around Franklin planners and they don't write down details of their day and they don't keep track of what day of the week it is during the summer when they're off on summer vacation. Younger people's memories are going to be different in some ways.

Krause argues that the prosecutor thus "advocated a lesser burden of proof because of the fact that his witnesses were teenagers." We disagree. Again, there was no objection at trial. In his closing argument, defense counsel stated as follows:

> We don't apply different tests for credibility because of age. We apply tests of credibility about what someone says and how they said it, their demeanor on the stand. How did they say to you what they said to you? How certain were they of what they said on the stand and yet were just as certain that they said something totally different [on an earlier occasion]?

Obviously, the prosecutor's argument was in response to defense counsel's. The prosecutor did not even hint that his burden of proof was the least bit relaxed because he was relying on teenage witnesses. Instead, he simply encouraged the jury to bear in mind that his witnesses were teenagers while evaluating their credibility. In other words, the prosecutor suggested not that incredible testimony was sufficient to convict if it came from teenagers, but that teenagers might be credible even if they have not carefully kept track of dates, etc. The trial court did indeed invite the jury to allow "the witness' age or maturity" to factor into how they judged that witness' testimony. Because the prosecutorial argument of which defendant here makes issue was responsive to defense counsel's argument, and an accurate statement of the law, it was not misconduct.

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[37] *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

[38] Krause also argues that these remarks improperly denigrated the defense. See *Bahoda, supra* at 283. However, because the prosecutor focused on the evidence, not on the personalities involved, Krause's characterization of this portion of the argument is inapt. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

E. Facts Not in Evidence

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case."[39] Krause predicates his argument that the prosecutor engaged in such misconduct on the following excerpt:

> Whether there was a tear in the vaginal area six weeks later, is that good evidence of anything, when you're looking at a period of six weeks? We heard there was some pain, but we didn't hear that there was any type of injury. We don't know anything about [the complainant's] past sexual history, there's nothing that—that whether or not a medical exam had been done would not be good evidence of anything in this case, because it was six weeks later.

Defense counsel objected to this argument on the ground that there had been no medical testimony. The trial court sustained the objection, and immediately instructed the jury that "there's no evidence either way to show that a medical examination would have been helpful." There was no request for a mistrial, or other remedy beyond what the trial court provided. To the extent that Krause now seeks a new trial because of this brief foray into improper argument, the issue is unpreserved. We are satisfied that the trial court's special instruction steered the jury from allowing medical considerations never brought into evidence to infect their deliberations. "It is well established that jurors are presumed to follow their instructions."[40]

We further note that, in closing argument, defense counsel stated as follows:

> Presumably [the complainant] was injured as a result of this incident, presumably she had a bleeding of the vaginal area, some type of tearing, some type of injury would have occurred. Even . . . when this was brought out, do you have any medical evidence, six weeks later, that there would be any tear, any injury that would have been caused to her vaginal area because of this alleged criminal sexual conduct?

Defense counsel thus first mentioned the lack of medical evidence, thereby inviting the prosecutor's response in kind. For that reason, and because the defense objection was sustained and followed by a curative instruction, no appellate relief is warranted.

[39] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[40] *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

VII. Challenge To Scoring Of Offense Variables 10 and 12

A. Standard Of Review

We review a sentencing court's factual findings for clear error.[41] However, the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo.[42]

B. OV 10

The trial court assessed Krause ten points for OV 10, which concerns victim vulnerability. This is the point total prescribed for cases in which the offender exploited a victim's youth or other certain other special vulnerabilities.[43] At sentencing, defense counsel complained that the victim's youthful age was an element of the conviction itself, and so should not be considered an aggravating factor for purposes of imposing sentence. The prosecutor responded that Krause was sixteen years older than the victim, and suggested that Krause exploited that age difference, and added that Krause also took advantage of the victim's state of intoxication on the occasion in question. The trial court described the age difference as "extraordinary," but focused mainly on the victim's alcohol consumption and the fact that Krause provided the alcohol to her in deciding to score ten points.

Krause points out that MCL 777.40(1)(c) prescribes five points where the offender exploited the victim's intoxication, and argues that he thus should have received no more than five points for OV 10. Had Krause merely come upon an intoxicated victim, this argument would have merit. But, as the trial court recognized, Krause provided the alcohol to his youthful victim. Krause's role in facilitating his youthful victim's intoxication, then, considered along with his sixteen-year age advantage, well justifies the assessment of ten points for OV 10.

C. OV 12

The trial court assessed five points for OV 12, which concerns contemporaneous felonies. MCL 777.42(1)(d) prescribes five points where, in addition to the sentencing offense, the offender engaged in "[o]ne contemporaneous felonious criminal act involving a crime against a person . . . ." The act that formed the basis for the scoring decision in this case was the inappropriate touching of the daughter of the owner of the house. The latter testified that she was fourteen years old at the time, and that defendant invited her into his bedroom, told her that he "had a little thing" for her, then put his hand on her "lower stomach," reaching "[j]ust at the tip" of her bathing suit bottoms, but withdrew when she protested.

As Krause points out, the jury found him not guilty of assault with intent to commit second-degree criminal sexual conduct. However, factfinding for purposes of sentencing is not

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[41] See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

[42] *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

[43] MCL 777.40(1)(b).

wholly derivative of factfinding attendant to trial proceedings, but takes place later, and is governed by substantially different rules. For purposes of sentencing, the court's consideration is confined neither to facts determined beyond a reasonable doubt, nor to evidence that would be admissible for determination of guilt or innocence. More particularly, factual findings for sentencing purposes require a mere preponderance of the evidence.[44] Information relied upon may come from several sources, including some that would not be admissible at trial, e.g., a presentence investigator's report.[45]

The trial court acknowledged defendant's acquittal in connection with this other young victim, but opined that a preponderance of the evidence indicated that the incident took place. The court explained, "the touching, as it was described, in the region where it was described, certainly is evidence of a touching with the intent to derive sexual gratification from it. She is fourteen, it was her pubic region."

Krause concedes that the evidence suggested that he engaged in unpermitted touching, but argues that it was mere misdemeanor battery. However, given the nature of the touching that took place, the intimate setting, and the verbal expression of attraction, the evidence militates in favor of the conclusion that Krause did this touching with the intention of achieving sexual gratification. This elevates a minor battery to a felony.[46] Because there was evidence to support the trial court's scoring of OV 12, we affirm that decision.[47]

D. Constitutional Challenge To Scoring Determinations

Finally, Krause argues that allowing the trial court to determine his offense variable scores using facts proved by a preponderance of the evidence was unconstitutional in light of *Blakely v Washington*,[48] which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Krause asserts that the "prescribed statutory maximum," under Michigan's sentencing scheme, is "[t]he intersection of a defendant's base offense level and criminal history category."

While we acknowledge that this area of the law is currently unsettled, our reading of *Blakely* indicates that Krause's interpretation has been foreclosed. First, under Michigan's sentencing scheme, the intersection of a defendant's base offense level and criminal history category establishes a defendant's *minimum* sentence. We are not persuaded that by Krause's assertion that the minimum sentence should be considered the "statutory maximum" in this context, particularly in light of the fact that the Supreme Court has held that the factual findings

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[44] See *People v Ewing (After Remand)*, 435 Mich 443, 472-473; 458 NW2d 880 (1990).

[45] *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See also MRE 1001(b)(3).

[46] MCL 750.520g(2); MCL 750.520b(1)(b); MCL 750.520a(n).

[47] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002).

[48] *Blakely v Washington*, 542 US ___, ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

underlying mandatory minimum sentences need not be established to a jury beyond a reasonable doubt.[49]

Second, *Blakely* addressed the constitutionality of a *determinate* sentencing scheme, and the Blakely majority expressly denied that its holding was applicable to *indeterminate* sentencing schemes like Michigan's. As the *Blakely* majority explained, the Sixth Amendment "is not a limitation on judicial power, but a reservation of jury power," and therefore it "limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.*"[50] While acknowledging that "indeterminate schemes involve judicial factfinding," the Court reasoned that those facts "do not pertain to whether the defendant has a legal right to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned."[51] The Court illustrated its point with the following example:

> In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.[52]

In this case, our system says that the sentencing court may punish a fourth habitual offender for third-degree CSC by up to life imprisonment.[53] Accordingly, we reject Krause's argument that he had a legal right to have the facts that determined his minimum sentence determined by a jury beyond a reasonable doubt.[54]

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette

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[49] See *Harris v United States*, 536 US 545, 561-568; 122 S Ct 2406; 153 L Ed 2d 524 (2002).

[50] *Blakely*, *supra* at ___, 124 S Ct at 2540 (emphasis added).

[51] *Id*.

[52] *Id*.

[53] See MCL 769.12(1)(a); MCL 777.16y.

[54] We note that our Supreme Court has recently indicated that the *Blakely* decision did not affect Michigan's indeterminate sentencing guidelines, although it did so in dicta. See *People v Claypool*, ___ Mich ___; ___ NW2d ___ (2004).

Sunday, August 29, 2004

Judge tosses out sentence guides

Lenawee circuit jurist imposes much heavier prison term on molester

Associated Press

ADRIAN — A Lenawee County circuit judge imposed a sentence on an admitted child molester that far exceeded state guidelines, calling the sentencing restrictions unconstitutional.

Circuit Judge Timothy P. Pickard on Wednesday threw out the guidelines to sentence John Lester Keller, 69, to a minimum of six years and nine months and a maximum of 10 years in prison, the Daily Telegram reported. The guidelines called for a sentence between no time and 11 months in the county jail.

Keller of Adrian admitted molesting a 6-year-old girl on June 30 and July 1 in Adrian Township and pleaded guilty to a reduced charge of assault with intent to commit sexual penetration.

Pickard based his decision on a June U.S. Supreme Court ruling that called into question sentencing practices around the country. The court said judges should not have the right to tack on extra time to sentences.

Although the high court's 5-4 ruling specifically applies only to the state of Washington, many observers said it could mean drastic changes for other states and the federal court system because they have similar guidelines.

However, the state Supreme Court ruled in July that the decision, Blakely v. Washington, did not affect Michigan.

In its 6-1 decision, the Michigan court said that the state's system differs from Washington's because the guidelines set a minimum sentence, but the maximum sentence is set by state law and can only be exceeded in the case of a habitual offender.

But Pickard said the state's sentencing law includes mandatory restrictions, not guidelines. The law limits judges to imposing county jail terms instead of sending offenders to state prisons for many felony offenses, he noted.

Like Washington states guidelines, Michigan guidelines require judges to make findings of fact outside the jury process to plug into a formula for sentencing, Pickard said.

Keller's attorney, Robert Jameson, criticized the sentence.
"No one has been punished this hard in a first-time offense situation," he said.

An Update on Michigan Sentencing Law & Procedure Seminar & Webcast

September 28, 2004
Michigan Hall of Justice
Lansing, Michigan

The Implications of *Blakely v Washington* and *People v Claypool* on Michigan Sentencing

Reference Material

- *Blakely v Washington* (white)
- *People v Claypool* (blue)

Michigan Judicial Institute

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BLAKELY *v.* WASHINGTON

CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON

No. 02–1632. Argued March 23, 2004—Decided June 24, 2004

Petitioner pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed, rejecting petitioner's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Held: Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury. Pp. 5–18.

(a) This case requires the Court to apply the rule of *Apprendi* v. *New Jersey,* 530 U. S. 466, 490, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence. Petitioner's sentence is not analogous to those upheld in *McMillan* v. *Pennsylvania,* 477 U. S. 79, and *Williams* v. *New York,* 337 U. S. 241, which were not greater than what state law authorized based on the verdict alone. Regardless of whether the judge's authority to impose the enhanced sentence depends on a judge's finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains

Syllabus

the case that the jury's verdict alone does not authorize the sentence. Pp. 5–9.

(b) This Court's commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of jury trial. Pp. 9–12.

(c) This case is not about the constitutionality of determinate sentencing, but only about how it can be implemented in a way that respects the Sixth Amendment. The Framers' paradigm for criminal justice is the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. That can be preserved without abandoning determinate sentencing and at no sacrifice of fairness to the defendant. Pp. 12–17.

111 Wash. App. 851, 47 P. 3d 149, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BREYER, J., joined, and in which REHNQUIST, C. J., and KENNEDY, J., joined except as to Part IV–B. KENNEDY, J., filed a dissenting opinion, in which BREYER, J., joined. BREYER, J., filed a dissenting opinion, in which O'CONNOR, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 02–1632

RALPH HOWARD BLAKELY, JR., PETITIONER *v.* WASHINGTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION 3

[June 24, 2004]

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnaping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." App. 40, 49. We consider whether this violated petitioner's Sixth Amendment right to trial by jury.

I

Petitioner married his wife Yolanda in 1973. He was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia. His wife ultimately filed for divorce. In 1998, he abducted her from their orchard home in Grant County, Washington, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. In the process, he implored her to dismiss the divorce suit and related trust proceedings.

When the couple's 13-year-old son Ralphy returned

home from school, petitioner ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so. Ralphy escaped and sought help when they stopped at a gas station, but petitioner continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police.

The State charged petitioner with first-degree kidnaping, Wash. Rev. Code Ann. §9A.40.020(1) (2000).[1] Upon reaching a plea agreement, however, it reduced the charge to second-degree kidnaping involving domestic violence and use of a firearm, see §§9A.40.030(1), 10.99.020(3)(p), 9.94A.125.[2] Petitioner entered a guilty plea admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts.

The case then proceeded to sentencing. In Washington, second-degree kidnaping is a class B felony. §9A.40.030(3). State law provides that "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." §9A.20.021(1)(b). Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. See §9.94A.320 (seriousness level V for second-degree kidnaping); App. 27 (offender score 2 based on §9.94A.360); §9.94A.310(1), box 2–V (standard range of 13–17 months); §9.94A.310(3)(b)

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[1] Parts of Washington's criminal code have been recodified and amended. We cite throughout the provisions in effect at the time of sentencing.

[2] Petitioner further agreed to an additional charge of second-degree assault involving domestic violence, Wash. Rev. Code Ann. §§9A.36.021(1)(c), 10.99.020(3)(b) (2000). The 14-month sentence on that count ran concurrently and is not relevant here.

(36-month firearm enhancement).[3] A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." §9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. §9.94A.390. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *State* v. *Gore*, 143 Wash. 2d 288, 315–316, 21 P. 3d 262, 277 (2001). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. §9.94A.120(3). A reviewing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Gore*, *supra*, at 315, 21 P. 3d, at 277 (citing §9.94A.210(4)).

Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months—37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases. §9.94A.390(2)(h)(iii).[4]

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[3]The domestic-violence stipulation subjected petitioner to such measures as a "no-contact" order, see §10.99.040, but did not increase the standard range of his sentence.

[4]The judge found other aggravating factors, but the Court of Appeals questioned their validity under state law and their independent sufficiency to support the extent of the departure. See 111 Wash. App. 851, 868–870, and n. 3, 47 P. 3d 149, 158–159, and n. 3 (2002). It affirmed

Faced with an unexpected increase of more than three years in his sentence, petitioner objected. The judge accordingly conducted a 3-day bench hearing featuring testimony from petitioner, Yolanda, Ralphy, a police officer, and medical experts. After the hearing, he issued 32 findings of fact, concluding:

> "The defendant's motivation to commit kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.
>
> "The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order." App. 48–49.

The judge adhered to his initial determination of deliberate cruelty.

Petitioner appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The State Court of Appeals affirmed, 111 Wash. App. 851, 870–871, 47 P. 3d 149, 159 (2002), relying on the Washington Supreme

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the sentence solely on the finding of domestic violence with deliberate cruelty. *Ibid.* We therefore focus only on that factor.

Court's rejection of a similar challenge in *Gore*, *supra*, at 311–315, 21 P. 3d, at 275–277. The Washington Supreme Court denied discretionary review. 148 Wash. 2d 1010, 62 P. 3d 889 (2003). We granted certiorari. 540 U. S. 965 (2003).

II

This case requires us to apply the rule we expressed in *Apprendi* v. *New Jersey,* 530 U. S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure §87, p. 55 (2d ed. 1872).[5] These principles have been

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[5] JUSTICE BREYER cites JUSTICE O'CONNOR's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must charge facts that trigger statutory aggravation of a common-law offense. *Post*, at 14 (dissenting opinion). Of course, as he notes, JUSTICE O'CONNOR was referring to an entirely different quotation, from *Archbold's* treatise. See 530 U. S., at 526 (citing J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). JUSTICE BREYER claims the two are "similar," *post*, at 14, but they are as similar as chalk and cheese. Bishop was not "addressing" the "problem" of statutes that aggravate common-law offenses. *Ibid*. Rather, the entire chapter of his treatise is devoted to the point that "every fact which is legally essential to the punishment" must be charged in the indictment and proved to a jury. 1 J. Bishop, Criminal Procedure, ch. 6, pp. 50–56 (2d ed. 1872). As one "example" of this principle (appearing several

acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see 530 U. S., at 476–483, 489–490, n. 15; *id.*, at 501–518 (THOMAS, J., concurring), and need not repeat them here.[6]

Apprendi involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed "'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.*, at 468–469 (quoting N. J. Stat. Ann. §2C:44–3(e) (West Supp. 1999–2000)). In *Ring* v. *Arizona,* 536 U. S. 584, 592–593, and n. 1 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could

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pages before the language we quote in text above), he notes a statute aggravating common-law assault. *Id.*, §82, at 51–52. But nowhere is there the slightest indication that his general principle was *limited* to that example. Even JUSTICE BREYER's academic supporters do not make *that* claim. See Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1131–1132 (2001) (conceding that Bishop's treatise supports *Apprendi*, while criticizing its "natural-law theorizing").

[6] As to JUSTICE O'CONNOR's criticism of the quantity of historical support for the *Apprendi* rule, *post*, at 10 (dissenting opinion): It bears repeating that the issue between us is not *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws. Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by *any* evidence favoring hers. JUSTICE O'CONNOR does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers "whatever the legislature chooses to leave to the jury, so long as it does not go too far" coherent. See *infra*, at 9–12.

have imposed under state law without the challenged factual finding. *Apprendi*, *supra*, at 491–497; *Ring*, *supra*, at 603–609.

In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in §9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See §9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See *Ring*, *supra*, at 602 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, *supra*, at 483)); *Harris* v. *United States,* 536 U. S. 545, 563 (2002) (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra*, §87, at 55, and the judge exceeds his proper authority.

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account

factors other than those which are used in computing the standard range sentence for the offense," *Gore*, 143 Wash. 2d, at 315–316, 21 P. 3d, at 277, which in this case included the elements of second-degree kidnaping and the use of a firearm, see §§9.94A.320, 9.94A.310(3)(b).[7] Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See §9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

The State defends the sentence by drawing an analogy to those we upheld in *McMillan* v. *Pennsylvania,* 477 U. S. 79 (1986), and *Williams* v. *New York,* 337 U. S. 241 (1949). Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. 477 U. S., at 81. We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.*, at 82; cf. *Harris*, *supra*, at 567. *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. 337 U. S., at 242–243, and n. 2. The judge could have "sentenced [the defendant] to death giving no reason at all." *Id.*, at 252. Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.

Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for

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[7]The State does not contend that the domestic-violence stipulation alone supports the departure. That the statute lists domestic violence as grounds for departure only when combined with some other aggravating factor suggests it could not. See §§9.94A.390(2)(h)(i)–(iii).

departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.[8]

Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid.[9]

III

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their

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[8] Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

[9] The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25–30. The Federal Guidelines are not before us, and we express no opinion on them.

just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones* v. *United States,* 526 U. S. 227, 244–248 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. Cf. 530 U. S., at 552–553 (O'CONNOR, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.[10]

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[10] JUSTICE O'CONNOR believes that a "built-in political check" will

The second alternative is that legislatures may establish legally essential sentencing factors *within limits*—limits crossed when, perhaps, the sentencing factor is a "tail which wags the dog of the substantive offense." *McMillan*, 477 U. S., at 88. What this means in operation is that the law must not go *too far*—it must not exceed the judicial estimation of the proper role of the judge.

The subjectivity of this standard is obvious. Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. See 111 Wash. App., at 869, 47 P. 3d, at 158.[11] Petitioner's 90-month sentence exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. See *State* v. *Oxborrow*, 106 Wash. 2d 525, 528, 533, 723 P. 2d 1123, 1125, 1128 (1986) (15-year exceptional sentence; 1-year standard maximum sentence); *State* v. *Branch*, 129 Wash. 2d 635, 650, 919 P. 2d 1228, 1235 (1996) (4-year exceptional sentence; 3-month standard maximum sentence).

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prevent lawmakers from manipulating offense elements in this fashion. *Post*, at 10. But the many immediate practical advantages of judicial factfinding, see *post*, at 5–7, suggest that political forces would, if anything, pull in the opposite direction. In any case, the Framers' decision to entrench the jury-trial right in the Constitution shows that they did not trust government to make political decisions in this area.

[11] Another example of conversion from separate crime to sentence enhancement that JUSTICE O'CONNOR evidently does not consider going "too far" is the obstruction-of-justice enhancement, see *post*, at 6–7. Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 W. Blackstone, Commentaries on the Laws of England 136–138 (1769)), is unclear.

Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

IV

By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." Brief for Respondent 34. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. See Wash. Rev. Code Ann. §9.94A.010 (2000). Nothing we have said impugns those salutary objectives.

JUSTICE O'CONNOR argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post*, at 1–10. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do

so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

But even assuming that restraint of judicial power unrelated to the jury's role is a Sixth Amendment objective, it is far from clear that *Apprendi* disserves that goal. Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-factfinding schemes would do, given the choice between the two alternatives. JUSTICE O'CONNOR simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction. Indeed, what evidence we have points exactly the other way: When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate-sentencing regime in *State* v. *Gould*, 271 Kan. 394, 404–414, 23 P. 3d 801, 809–814 (2001), the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi*'s requirements to its

current regime. See Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp. 1018–1023 (codified at Kan. Stat. Ann. §21–4718 (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3–7. The result was less, not more, judicial power.

JUSTICE BREYER argues that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. *Post*, at 4–5. But nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi*, 530 U. S., at 488; *Duncan* v. *Louisiana,* 391 U. S. 145, 158 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.[12]

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[12] JUSTICE BREYER responds that States are not *required* to give defendants the option of waiving jury trial on some elements but not others. *Post*, at 8–9. True enough. But why would the States that he asserts we are coercing into hard-heartedness—that is, States that *want* judge-pronounced determinate sentencing to be the norm but we won't let them—want to prevent a defendant from *choosing* that regime? JUSTICE BREYER claims this alternative may prove "too expensive and unwieldy for States to provide," *post*, at 9, but there is no obvious reason why forcing defendants to choose between contesting all elements of his hypothetical 17-element robbery crime and contesting none of them is less expensive than also giving them the third option of pleading guilty to some elements and submitting the rest to judicial

Nor do we see any merit to JUSTICE BREYER's contention that *Apprendi* is unfair to criminal defendants because, if States respond by enacting "17-element robbery crime[s]," prosecutors will have more elements with which to bargain. *Post*, at 4–5, 9 (citing Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097 (2001)). Bargaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable. If there is any difference between bargaining over sentencing factors and bargaining over elements, the latter probably favors the defendant. Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. Moreover, given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal. See King & Klein, *Apprendi* and Plea Bargaining, 54 Stan. L. Rev. 295, 296 (2001) ("Every prosecutorial bargaining chip mentioned by Professor Bibas existed pre-*Apprendi* exactly as it does post-*Apprendi*").

Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 U. S. C. §§841(b)(1)(A), (D),[13]

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factfinding. JUSTICE BREYER's argument rests entirely on a speculative prediction about the number of defendants likely to choose the first (rather than the second) option if denied the third.

[13] To be sure, JUSTICE BREYER and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear.

based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects JUSTICE BREYER identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

The implausibility of JUSTICE BREYER's contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side. JUSTICE BREYER's only authority asking that defendants be protected from *Apprendi* is an article written not by a criminal defense lawyer but by a law professor and former prosecutor. See *post*, at 4–5 (citing Bibas, *supra*); Association of American Law Schools Directory of Law Teachers 2003–2004, p. 319.

JUSTICE BREYER also claims that *Apprendi* will attenuate the connection between "real criminal conduct and real punishment" by encouraging plea bargaining and by restricting alternatives to adversarial factfinding. *Post*, at 7–8, 11–12. The short answer to the former point (even assuming the questionable premise that *Apprendi* does encourage plea bargaining, but see *supra*, at 14, and n. 12) is that the Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It

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Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.

guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place. That more defendants elect to waive that right (because, for example, government at the moment is not particularly oppressive) does not prove that a constitutional provision guaranteeing *availability* of that option is disserved.

JUSTICE BREYER's more general argument—that *Apprendi* undermines alternatives to adversarial factfinding—is not so much a criticism of *Apprendi* as an assault on jury trial generally. His esteem for "non-adversarial" truth-seeking processes, *post*, at 12, supports just as well an argument against either. Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. See 3 Blackstone, Commentaries, at 373–374, 379–381. JUSTICE BREYER may be convinced of the equity of the regime he favors, but his views are not the ones we are bound to uphold.

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter.

* * *

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

The judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 02–1632

RALPH HOWARD BLAKELY, JR., PETITIONER *v.* WASHINGTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION 3

[June 24, 2004]

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, and with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join as to all but Part IV–B, dissenting.

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you—dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional, *ante*, at 12; for, as residents of "*Apprendi*-land" are fond of saying, "the relevant inquiry is one not of form, but of effect." *Apprendi* v. *New Jersey,* 530 U. S. 466, 494 (2000); *Ring* v. *Arizona*, 536 U. S. 584, 613 (2002) (SCALIA, J., concurring). The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing. Because I find it implausible that the Framers would have considered such a result to be required by the Due Process Clause or the Sixth Amendment, and because the practical consequences of today's decision may be disastrous, I respectfully dis-

sent.

I

One need look no further than the history leading up to and following the enactment of Washington's guidelines scheme to appreciate the damage that today's decision will cause. Prior to 1981, Washington, like most other States and the Federal Government, employed an indeterminate sentencing scheme. Washington's criminal code separated all felonies into three broad categories: "class A," carrying a sentence of 20 years to life; "class B," carrying a sentence of 0 to 10 years; and "class C," carrying a sentence of 0 to 5 years. Wash. Rev. Code Ann. §9A.20.020 (2000); see also Sentencing Reform Act of 1981, 1981 Wash. Laws, ch. 137, p. 534. Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation—*i.e.*, no jail sentence at all. Wash. Rev. Code Ann. §§9.95.010–.011; Boerner & Lieb, Sentencing Reform in the Other Washington, 28 Crime and Justice 71, 73 (M. Tonry ed. 2001) (hereinafter Boerner & Lieb) ("Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion"). See also D. Boerner, Sentencing in Washington §2.4, pp. 2–27 to 2–28 (1985).

This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Boerner & Lieb 126–127; cf. S. Rep. No. 98–225, p. 38 (1983) (Senate Report on precursor to federal Sentencing Reform Act of 1984) ("[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . These disparities, whether they occur at the time of

the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence"). Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race. Boerner & Lieb 126–128. See also Breyer, The Federal Sentencing Guidelines and Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 5 (1988) (elimination of racial disparity one reason behind Congress' creation of the Federal Sentencing Commission).

To counteract these trends, the state legislature passed the Sentencing Reform Act of 1981. The Act had the laudable purposes of "mak[ing] the criminal justice system accountable to the public," and "[e]nsur[ing] that the punishment for a criminal offense is proportionate to the seriousness of the offense . . . [and] commensurate with the punishment imposed on others committing similar offenses." Wash. Rev. Code Ann. §9.94A.010 (2000). The Act neither increased any of the statutory sentencing ranges for the three types of felonies (though it did eliminate the statutory mandatory minimum for class A felonies), nor reclassified any substantive offenses. 1981 Wash. Laws ch. 137, p. 534. It merely placed meaningful constraints on discretion to sentence offenders within the statutory ranges, and eliminated parole. There is thus no evidence that the legislature was attempting to manipulate the statutory elements of criminal offenses or to circumvent the procedural protections of the Bill of Rights. Rather, lawmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise "'labyrinthine' sentencing and corrections system that 'lack[ed] any principle except unguided discretion.'" Boerner & Lieb 73 (quoting F. Zimring, Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform, Occasional Paper No. 12, p. 6 (1977)).

II

Far from disregarding principles of due process and the jury trial right, as the majority today suggests, Washington's reform has served them. Before passage of the Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sentence or probation. The ultimate sentencing determination could turn as much on the idiosyncracies of a particular judge as on the specifics of the defendant's crime or background. A defendant did not know what facts, if any, about his offense or his history would be considered relevant by the sentencing judge or by the parole board. After passage of the Act, a defendant charged with second degree kidnaping knows what his presumptive sentence will be; he has a good idea of the types of factors that a sentencing judge can and will consider when deciding whether to sentence him outside that range; he is guaranteed meaningful appellate review to protect against an arbitrary sentence. Boerner & Lieb 93 ("By consulting one sheet, practitioners could identify the applicable scoring rules for criminal history, the sentencing range, and the available sentencing options for each case"). Criminal defendants still face the same statutory maximum sentences, but they now at least know, much more than before, the real consequences of their actions.

Washington's move to a system of guided discretion has served equal protection principles as well. Over the past 20 years, there has been a substantial reduction in racial disparity in sentencing across the State. *Id.,* at 126 (Racial disparities that do exist "are accounted for by differences in legally relevant variables—the offense of conviction and prior criminal record"); *id*., at 127 ("[J]udicial authority to impose exceptional sentences under the court's departure authority shows little evidence of disparity correlated with race"). The reduction is directly traceable to the constraining effects of the guidelines—

namely, its "presumptive range[s]" and limits on the imposition of "exceptional sentences" outside of those ranges. *Id.,* at 128. For instance, sentencing judges still retain unreviewable discretion in first-time offender cases and in certain sex offender cases to impose alternative sentences that are far more lenient than those contemplated by the guidelines. To the extent that unjustifiable racial disparities have persisted in Washington, it has been in the imposition of such alternative sentences: "The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion." *Ibid.*; see also Washington State Minority and Justice Commission, R. Crutchfield, J. Weis, R. Engen, & R. Gainey, Racial/Ethnic Disparities and Exceptional Sentences in Washington State, Final Report 51–53 (1993) ("[E]xceptional sentences are not a major source of racial disparities in sentencing").

The majority does not, because it cannot, disagree that determinate sentencing schemes, like Washington's, serve important constitutional values. *Ante*, at 12. Thus, the majority says: "[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Ibid*. But extension of *Apprendi* to the present context will impose significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence. While not a constitutional prohibition on guidelines schemes, the majority's decision today exacts a substantial constitutional tax.

The costs are substantial and real. Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range—such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury, *In re Winship*, 397 U. S. 358

(1970), simply because it is the legislature, rather than the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range.

While that alone is enough to threaten the continued use of sentencing guidelines schemes, there are additional costs. For example, a legislature might rightly think that some factors bearing on sentencing, such as prior bad acts or criminal history, should not be considered in a jury's determination of a defendant's guilt—such "character evidence" has traditionally been off limits during the guilt phase of criminal proceedings because of its tendency to inflame the passions of the jury. See, *e.g.*, Fed. Rule Evid. 404; 1 E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Leaderer, Courtroom Criminal Evidence 285 (3d ed. 1998). If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury's initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.

Some facts that bear on sentencing either will not be discovered, or are not discoverable, prior to trial. For instance, a legislature might desire that defendants who act in an obstructive manner during trial or post-trial proceedings receive a greater sentence than defendants who do not. See, *e.g.*, United States Sentencing Commission, Guidelines Manual, §3C1.1 (Nov. 2003) (hereinafter USSG) (2-point increase in offense level for obstruction of justice). In such cases, the violation arises too late for the State to provide notice to the defendant or to argue the facts to the jury. A State wanting to make such facts relevant at sentencing must now either vest sufficient discretion in the judge to account for them *or* bring a separate criminal prosecution for obstruction of justice or perjury. And, the latter option is available only to the extent that a defendant's obstructive behavior is so severe

as to constitute an already-existing separate offense, unless the legislature is willing to undertake the unlikely expense of criminalizing relatively minor obstructive behavior.

Likewise, not all facts that historically have been relevant to sentencing always will be known prior to trial. For instance, trial or sentencing proceedings of a drug distribution defendant might reveal that he sold primarily to children. Under the majority's approach, a State wishing such a revelation to result in a higher sentence within a pre-existing statutory range either must vest judges with sufficient discretion to account for it (and trust that they exercise that discretion) *or* bring a separate criminal prosecution. Indeed, the latter choice might not be available—a separate prosecution, if it is for an aggravated offense, likely would be barred altogether by the Double Jeopardy Clause. *Blockburger* v. *United States,* 284 U. S. 299 (1932) (cannot prosecute for separate offense unless the two offenses both have at least one element that the other does not).

The majority may be correct that States and the Federal Government will be willing to bear some of these costs. *Ante*, at 13–14. But simple economics dictate that they will not, and cannot, bear them all. To the extent that they do not, there will be an inevitable increase in judicial discretion with all of its attendant failings.[1]

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[1]The paucity of empirical evidence regarding the impact of extending *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000), to guidelines schemes should come as no surprise to the majority. *Ante*, at 13. Prior to today, only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme. Compare *State* v. *Gould*, 271 Kan. 394, 23 P. 3d 801 (2001), with, *e.g.*, *United States* v. *Goodine*, 326 F. 3d 26 (CA1 2003); *United States* v. *Luciano*, 311 F. 3d 146 (CA2 2002); *United States* v. *DeSumma*, 272 F. 3d 176 (CA3 2001); *United States* v. *Kinter*, 235 F. 3d 192 (CA4 2000); *United States* v. *Randle*, 304 F. 3d 373 (CA5 2002); *United States* v. *Helton*, 349 F. 3d 295 (CA6 2003); *United States* v.

III

Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which petitioner was exposed. See Wash. Rev. Code Ann. §9A.40.030 (2003) (second degree kidnaping class B felony since 1975); see also *State* v. *Pawling,* 23 Wash. App. 226, 228–229, 597 P. 2d 1367, 1369 (1979) (citing second degree kidnapping provision as existed in 1977). Petitioner was informed in the charging document, his plea agreement, and during his plea hearing that he faced a potential statutory maximum of 10 years in prison. App. 63, 66, 76. As discussed above, the guidelines served due process by providing notice to petitioner of the consequences of his acts; they vindicated his jury trial right by informing him of the stakes of risking trial; they served equal protection by ensuring petitioner that invidious characteristics such as race would not impact his sentence.

Given these observations, it is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision. The majority chides the *Apprendi* dissenters for preferring a nuanced interpretation of the Due Process Clause and Sixth Amendment jury trial guarantee that would generally defer to legislative labels while acknowledging the existence of constitutional constraints—what the majority calls the "the law must not go too far" approach. *Ante*, at 11 (emphasis deleted). If

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Johnson, 335 F. 3d 589 (CA7 2003) *(per curiam); United States* v. *Piggie*, 316 F. 3d 789 (CA8 2003); *United States* v. *Toliver*, 351 F. 3d 423 (CA9 2003); *United States* v. *Mendez-Zamora*, 296 F. 3d 1013 (CA10 2002); *United States* v. *Sanchez*, 269 F. 3d 1250 (CA11 2001); *United States* v. *Fields*, 251 F. 3d 1041 (CADC 2001); *State* v. *Dilts*, 336 Ore. 158, 82 P. 3d 593 (2003); *State* v. *Gore*, 143 Wash. 2d 288, 21 P. 3d 262 (2001); *State* v. *Lucas*, 353 N. C. 568, 548 S. E. 2d 712 (2001); *State* v. *Dean*, No. C4–02–1225, 2003 WL 21321425 (Minn. Ct. App., June 10, 2003) (unpublished opinion). Thus, there is no map of the uncharted territory blazed by today's unprecedented holding.

indeed the choice is between adopting a balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law, and adopting a rigid rule that destroys everything in its path, I will choose the former. See *Apprendi,* 530 U. S., at 552–554 (O'CONNOR, J., dissenting) ("Because I do not believe that the Court's 'increase in the maximum penalty' rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute by analyzing the factors we have examined in past cases" (citation omitted)).

But even were one to accept formalism as a principle worth vindicating for its own sake, it would not explain *Apprendi*'s, or today's, result. A rule of deferring to legislative labels has no less formal pedigree. It would be more consistent with our decisions leading up to *Apprendi*, see *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998) (fact of prior conviction not an element of aggravated recidivist offense); *United States* v. *Watts*, 519 U. S. 148 (1997) *(per curiam)* (acquittal of offense no bar to consideration of underlying conduct for purposes of guidelines enhancement); *Witte* v. *United States*, 515 U. S. 389 (1995) (no double jeopardy bar against consideration of uncharged conduct in imposition of guidelines enhancement); *Walton* v. *Arizona*, 497 U. S. 639 (1990) (aggravating factors need not be found by a jury in capital case); *Mistretta* v. *United States,* 488 U. S. 361 (1989) (Federal Sentencing Guidelines do not violate separation of powers); *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) (facts increasing mandatory minimum sentence are not necessarily elements); and it would vest primary authority for defining crimes in the political branches, where it belongs. *Apprendi*, *supra*, at 523–554 (O'CONNOR, J., dissenting). It also would be easier to administer than the majority's rule, inasmuch as courts would not be forced to look behind statutes and regulations to determine whether a

particular fact does or does not increase the penalty to which a defendant was exposed.

The majority is correct that rigid adherence to such an approach *could conceivably* produce absurd results, *ante*, at 10; but, as today's decision demonstrates, rigid adherence to the majority's approach *does and will continue* to produce results that disserve the very principles the majority purports to vindicate. The pre-*Apprendi* rule of deference to the legislature retains a built-in political check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase proceedings of lesser included and easier-to-prove offenses—*e.g.*, the majority's hypothesized prosecution of murder in the guise of a traffic offense sentencing proceeding. *Ante,* at 10. There is no similar check, however, on application of the majority's "'any fact that increases the upper bound of judicial discretion'" by courts.

The majority claims the mantle of history and original intent. But as I have explained elsewhere, a handful of state decisions in the mid-19th century and a criminal procedure treatise have little if any persuasive value as evidence of what the Framers of the Federal Constitution intended in the late 18th century. See *Apprendi,* 530 U. S., at 525–528 (O'CONNOR, J., dissenting). Because broad judicial sentencing discretion was foreign to the Framers, *id.*, at 478–479 (citing J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862)), they were never faced with the constitutional choice between submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offenses and offenders.

IV

A

The consequences of today's decision will be as far

reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. See, *e.g.*, Alaska Stat. §12.55.155 (2003); Ark. Code Ann. §16–90–804 (Supp. 2003); Fla. Stat. §921.0016 (2003); Kan. Stat. Ann. §21–4701 *et seq*. (2003); Mich. Comp. Laws Ann. §769.34 (West Supp. 2004); Minn. Stat. §244.10 (2002); N. C. Gen. Stat. §15A–1340.16 (Lexis 2003); Ore. Admin. Rule §213–008–0001 (2003); 204 Pa. Code §303 *et seq*. (2004), reproduced following 42 Pa. Cons. Stat. Ann. §9721 (Purden Supp. 2004); 18 U. S. C. §3553; 28 U. S. C. §991 *et seq*. Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy. And, despite the fact that we hold in *Schriro* v. *Summerlin, post*, p. ___, that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack. See *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality opinion) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").[2]

The practical consequences for trial courts, starting

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[2]The numbers available from the federal system alone are staggering. On March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue. Memorandum from Carl Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (June 1, 2004) (available in Clerk of the Court's case file). Between June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court. Memorandum, *supra.* Given that nearly all federal sentences are governed by the Federal Sentencing Guidelines, the vast majority of these cases are Guidelines cases.

today, will be equally unsettling: How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? The Court ignores the havoc it is about to wreak on trial courts across the country.

B

It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines. See *ante*, at 9, n. 9 ("The Federal Guidelines are not before us, and we express no opinion on them"); cf. *Apprendi, supra,* at 496–497 (claiming not to overrule *Walton*, *supra,* soon thereafter overruled in *Ring*); *Apprendi, supra*, at 497, n. 21 (reserving question of Federal Sentencing Guidelines). The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, see *Stinson* v. *United States*, 508 U. S. 36 (1993); and Congress has unfettered control to reject or accept any particular guideline, *Mistretta*, 488 U. S., at 393–394.

The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction. Brief for United States as *Amicus Curiae* 27–29. Washington's scheme is almost identical to the upward departure regime established by 18 U. S. C. §3553(b) and implemented in USSG §5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The provision struck down here provides for an increase in the upper bound of the presumptive sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann.

§9.94A.120 (2000). The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. §9.94A.390. The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. *Ante*, at 8–9. This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. See, *e.g.*, USSG §2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); §2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); §3C1.1 (general increase in offense level for obstruction of justice).

Indeed, the "extraordinary sentence" provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State's "real facts" doctrine precludes reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense. See Wash. Rev. Code Ann. §9.94A.370(2) (2000) (codifying "real facts" doctrine). If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.

* * *

What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy. *Apprendi*, 530 U. S., at 549–559 (O'CONNOR, J., dissenting); *Ring*, 536 U. S., at 619–621 (O'CONNOR, J., dissenting). I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 02–1632

RALPH HOWARD BLAKELY, JR., PETITIONER *v.* WASHINGTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION 3

[June 24, 2004]

JUSTICE KENNEDY, with whom JUSTICE BREYER joins, dissenting.

The majority opinion does considerable damage to our laws and to the administration of the criminal justice system for all the reasons well stated in JUSTICE O'CONNOR's dissent, plus one more: The Court, in my respectful submission, disregards the fundamental principle under our constitutional system that different branches of government "converse with each other on matters of vital common interest." *Mistretta* v. *United States,* 488 U. S. 361, 408 (1989). As the Court in *Mistretta* explained, the Constitution establishes a system of government that presupposes, not just "'autonomy'" and "'separateness,'" but also "'interdependence'" and "'reciprocity.'" *Id.*, at 381 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 635 (1952) (Jackson, J., concurring)). Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and

the evolution of the law, is basic constitutional theory in action.

Sentencing guidelines are a prime example of this collaborative process. Dissatisfied with the wide disparity in sentencing, participants in the criminal justice system, including judges, pressed for legislative reforms. In response, legislators drew from these participants' shared experiences and enacted measures to correct the problems, which, as JUSTICE O'CONNOR explains, could sometimes rise to the level of a constitutional injury. As *Mistretta* recognized, this interchange among different actors in the constitutional scheme is consistent with the Constitution's structural protections.

To be sure, this case concerns the work of a state legislature, and not of Congress. If anything, however, this distinction counsels even greater judicial caution. Unlike *Mistretta*, the case here implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment. See *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). With no apparent sense of irony that the effect of today's decision is the destruction of a sentencing scheme devised by democratically elected legislators, the majority shuts down alternative, nonjudicial, sources of ideas and experience. It does so under a faintly disguised distrust of judges and their purported usurpation of the jury's function in criminal trials. It tells not only trial judges who have spent years studying the problem but also legislators who have devoted valuable time and resources "calling upon the accumulated wisdom and experience of the Judicial Branch . . . on a matter uniquely within the ken of judges," *Mistretta*, *supra*, at 412, that their efforts and judgments were all for naught. Numerous States that have enacted sentencing guidelines similar to the one in Washington State are now

commanded to scrap everything and start over.

If the Constitution required this result, the majority's decision, while unfortunate, would at least be understandable and defensible. As JUSTICE O'CONNOR's dissent demonstrates, however, this is simply not the case. For that reason, and because the Constitution does not prohibit the dynamic and fruitful dialogue between the judicial and legislative branches of government that has marked sentencing reform on both the state and the federal levels for more than 20 years, I dissent.

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JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, dissenting.

The Court makes clear that it means what it said in *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000). In its view, the Sixth Amendment says that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.'" *Ante,* at 5 (quoting *Apprendi, supra,* at 490). "'[P]rescribed statutory maximum'" means the penalty that the relevant statute authorizes "solely on the basis of the facts reflected in the jury verdict." *Ante,* at 7 (emphasis deleted). Thus, a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime.

It is not difficult to understand the impulse that produced this holding. Imagine a classic example—a statute (or mandatory sentencing guideline) that provides a 10-year sentence for ordinary bank robbery, but a 15-year sentence for bank robbery committed with a gun. One might ask why it should matter for jury trial purposes whether the statute (or guideline) labels the gun's presence (a) a *sentencing fact* about the way in which the offender carried out the *lesser* crime of ordinary bank robbery, or (b) a factual *element* of the *greater* crime of bank robbery with a gun? If the Sixth Amendment re-

quires a jury finding about the gun in the latter circumstance, why should it not also require a jury to find the same fact in the former circumstance? The two sets of circumstances are functionally identical. In both instances, identical punishment follows from identical factual findings (related to, *e.g.,* a bank, a taking, a thing-of-value, force or threat of force, and a gun). The only difference between the two circumstances concerns a legislative (or Sentencing Commission) decision about which *label* ("sentencing fact" or "element of a greater crime") to affix to one of the facts, namely, the presence of the gun, that will lead to the greater sentence. Given the identity of circumstances apart from the label, the jury's traditional fact-finding role, and the law's insistence upon treating like cases alike, why should the legislature's labeling choice make an important Sixth Amendment difference?

The Court in *Apprendi,* and now here, concludes that it should not make a difference. The Sixth Amendment's jury trial guarantee applies similarly to both. I agree with the majority's analysis, but not with its conclusion. That is to say, I agree that, classically speaking, the difference between a traditional sentencing factor and an element of a greater offense often comes down to a legislative choice about which label to affix. But I cannot jump from there to the conclusion that the Sixth Amendment always requires identical treatment of the two scenarios. That jump is fraught with consequences that threaten the fairness of our traditional criminal justice system; it distorts historical sentencing or criminal trial practices; and it upsets settled law on which legislatures have relied in designing punishment systems.

The Justices who have dissented from *Apprendi* have written about many of these matters in other opinions. See 530 U. S., at 523–554 (O'CONNOR, J., dissenting); *id.,* at 555–566 (BREYER, J., dissenting); *Harris* v. *United States,* 536 U. S. 545, 549–550, 556–569 (2002) (KENNEDY,

J.); *id.,* at 569–572 (BREYER, J., concurring in part and concurring in judgment); *Jones* v. *United States,* 526 U. S. 227, 254, 264–272 (1999) (KENNEDY, J., dissenting); *Monge* v. *California,* 524 U. S. 721, 728–729 (1998) (O'CONNOR, J.); *McMillan* v. *Pennsylvania,* 477 U. S. 79, 86–91 (1986) (REHNQUIST, C. J.). At the risk of some repetition, I shall set forth several of the most important considerations here. They lead me to conclude that I must again dissent.

I

The majority ignores the adverse consequences inherent in its conclusion. As a result of the majority's rule, sentencing must now take one of three forms, each of which risks either impracticality, unfairness, or harm to the jury trial right the majority purports to strengthen. This circumstance shows that the majority's Sixth Amendment interpretation cannot be right.

A

A first option for legislators is to create a simple, pure or nearly pure "charge offense" or "determinate" sentencing system. See Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 8–9 (1988). In such a system, an indictment would charge a few facts which, taken together, constitute a crime, such as robbery. Robbery would carry a single sentence, say, five years' imprisonment. And every person convicted of robbery would receive that sentence—just as, centuries ago, everyone convicted of almost any serious crime was sentenced to death. See, *e.g.,* Lillquist, The Puzzling Return of Jury Sentencing: Misgivings About *Apprendi*, 82 N. C. L. Rev. 621, 630 (2004).

Such a system assures uniformity, but at intolerable costs. First, simple determinate sentencing systems impose identical punishments on people who committed their

crimes in very different ways. When dramatically different conduct ends up being punished the same way, an injustice has taken place. Simple determinate sentencing has the virtue of treating like cases alike, but it simultaneously fails to treat different cases differently. Some commentators have leveled this charge at sentencing guideline systems themselves. See, *e.g.,* Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 Am. Crim. L. Rev. 833, 847 (1992) (arguing that the "most important problem under the [Federal] Guidelines system is not too much disparity, but rather excessive uniformity" and arguing for adjustments, including elimination of mandatory minimums, to make the Guidelines system more responsive to relevant differences). The charge is doubly applicable to simple "pure charge" systems that permit no departures from the prescribed sentences, even in extraordinary cases.

Second, in a world of statutorily fixed mandatory sentences for many crimes, determinate sentencing gives tremendous power to prosecutors to manipulate sentences through their choice of charges. Prosecutors can simply charge, or threaten to charge, defendants with crimes bearing higher mandatory sentences. Defendants, knowing that they will not have a chance to argue for a lower sentence in front of a judge, may plead to charges that they might otherwise contest. Considering that most criminal cases do not go to trial and resolution by plea bargaining is the norm, the rule of *Apprendi*, to the extent it results in a return to determinate sentencing, threatens serious unfairness. See Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1100–1101 (2001) (explaining that the rule of *Apprendi* hurts defendants by depriving them of sentencing hearings, "the only hearings they were likely to have"; forcing defendants to surrender sentencing issues like drug quantity when they agree to the plea; and trans-

ferring power to prosecutors).

B

A second option for legislators is to return to a system of indeterminate sentencing, such as California had before the recent sentencing reform movement. See *Payne* v. *Tennessee,* 501 U. S. 808, 820 (1991) ("With the increasing importance of probation, as opposed to imprisonment, as a part of the penological process, some States such as California developed the 'indeterminate sentence,' where the time of incarceration was left almost entirely to the penological authorities rather than to the courts"); Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 Boston College L. Rev. 255, 267 (2004) ("In the late 1970s, California switched from an indeterminate criminal sentencing scheme to determinate sentencing" (footnote omitted)). Under indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad power to decide when to release a prisoner.

When such systems were in vogue, they were criticized, and rightly so, for producing unfair disparities, including race-based disparities, in the punishment of similarly situated defendants. See, *e.g., ante,* at 2–3 (O'CONNOR, J., dissenting) (citing sources). The length of time a person spent in prison appeared to depend on "what the judge ate for breakfast" on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence. See Breyer, *supra,* at 4–5 (citing congressional and expert studies indicating that, before the United States Sentencing Commission Guidelines were promulgated, punishments for identical crimes in the Second Circuit ranged from 3 to 20 years' imprisonment and that sentences varied depending upon region, gender of the defendant, and race of the

defendant). And under such a system, the judge could vary the sentence greatly based upon his findings about how the defendant had committed the crime—findings that might not have been made by a "preponderance of the evidence," much less "beyond a reasonable doubt." See *McMillan,* 477 U. S., at 91 ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" (citing *Williams* v. *New York,* 337 U. S. 241 (1949))).

Returning to such a system would diminish the "'reason'" the majority claims it is trying to uphold. *Ante,* at 5 (quoting 1 J. Bishop, Criminal Procedure §87, p. 55 (2d ed. 1872)). It also would do little to "ensur[e] [the] control" of what the majority calls "the peopl[e,]" *i.e.*, the jury, "in the judiciary," *ante,* at 9, since "the peopl[e]" would only decide the defendant's guilt, a finding with no effect on the duration of the sentence. While "the judge's authority to sentence" would formally derive from the jury's verdict, the jury would exercise little or no control over the sentence itself. *Ante,* at 10. It is difficult to see how such an outcome protects the structural safeguards the majority claims to be defending.

C

A third option is that which the Court seems to believe legislators will in fact take. That is the option of retaining structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modifying them to conform to *Apprendi*'s dictates. Judges would be able to depart *downward* from presumptive sentences upon finding that mitigating factors were present, but would not be able to depart *upward* unless the prosecutor charged the aggravating fact to a jury and proved it beyond a reasonable doubt. The majority argues, based on the single example of Kansas, that most legislatures will enact amendments along these lines in the face

of the oncoming *Apprendi* train. See *ante,* at 13–14 (citing *State* v. *Gould,* 271 Kan. 394, 404–414, 23 P. 3d 801, 809–814 (2001); Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp. 1018–1023 (codified at Kan. Stat. Ann. §21–4718 (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3–7). It is therefore worth exploring how this option could work in practice, as well as the assumptions on which it depends.

1

This option can be implemented in one of two ways. The first way would be for legislatures to subdivide each crime into a list of complex crimes, each of which would be defined to include commonly found sentencing factors such as drug quantity, type of victim, presence of violence, degree of injury, use of gun, and so on. A legislature, for example, might enact a robbery statute, modeled on robbery sentencing guidelines, that increases punishment depending upon (1) the nature of the institution robbed, (2) the (a) presence of, (b) brandishing of, (c) other use of, a firearm, (3) making of a death threat, (4) presence of (a) ordinary, (b) serious, (c) permanent or life threatening, bodily injury, (5) abduction, (6) physical restraint, (7) taking of a firearm, (8) taking of drugs, (9) value of property loss, etc. Cf. United States Sentencing Commission, Guidelines Manual §2B3.1 (Nov. 2003) (hereinafter USSG).

This possibility is, of course, merely a highly calibrated form of the "pure charge" system discussed in Part I–A, *supra*. And it suffers from some of the same defects. The prosecutor, through control of the precise charge, controls the punishment, thereby marching the sentencing system directly away from, not toward, one important guideline goal: rough uniformity of punishment for those who engage in roughly the same *real* criminal conduct. The artificial (and consequently unfair) nature of the resulting sentence is aggravated by the fact that prosecutors must

charge all relevant facts about the way the crime was committed before a presentence investigation examines the criminal conduct, perhaps before the trial itself, *i.e.,* before many of the facts relevant to punishment are known.

This "complex charge offense" system also prejudices defendants who seek trial, for it can put them in the untenable position of contesting material aggravating facts in the guilt phases of their trials. Consider a defendant who is charged, not with mere possession of cocaine, but with the specific offense of possession of more than 500 grams of cocaine. Or consider a defendant charged, not with murder, but with the new crime of murder using a machete. Or consider a defendant whom the prosecution wants to claim was a "supervisor," rather than an ordinary gang member. How can a Constitution that guarantees due process put these defendants, as a matter of course, in the position of arguing, "I did not sell drugs, and if I did, I did not sell more than 500 grams" or, "I did not kill him, and if I did, I did not use a machete," or "I did not engage in gang activity, and certainly not as a supervisor" to a single jury? See *Apprendi,* 530 U. S., at 557–558 (BREYER, J., dissenting); *Monge,* 524 U. S., at 729. The system can tolerate this kind of problem up to a point (consider the defendant who wants to argue innocence, and, in the alternative, second-degree, not first-degree, murder). But a rereading of the many distinctions made in a typical robbery guideline, see *supra*, at 7, suggests that an effort to incorporate any real set of guidelines in a complex statute would reach well beyond that point.

The majority announces that there really is no problem here because "States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty" and defendants may "stipulat[e] to the relevant facts or consen[t] to judicial factfinding." *Ante,* at 14. The problem, of course, concerns defendants who do not want

to plead guilty to those elements that, until recently, were commonly thought of as sentencing factors. As to those defendants, the fairness problem arises because States may very well decide that they will *not* permit defendants to carve subsets of facts out of the new, *Apprendi*-required 17-element robbery crime, seeking a judicial determination as to some of those facts and a jury determination as to others. Instead, States may simply require defendants to plead guilty to all 17 elements or proceed with a (likely prejudicial) trial on all 17 elements.

The majority does not deny that States may make this choice; it simply fails to understand *why* any State would want to exercise it. *Ante,* at 14, n. 12. The answer is, as I shall explain in a moment, that the alternative may prove too expensive and unwieldy for States to provide. States that offer defendants the option of judicial factfinding as to some facts (*i.e.,* sentencing facts), say, because of fairness concerns, will also have to offer the defendant a second sentencing jury—just as Kansas has done. I therefore turn to that alternative.

2

The second way to make sentencing guidelines *Apprendi*-compliant would be to require at least two juries for each defendant whenever aggravating facts are present: one jury to determine guilt of the crime charged, and an additional jury to try the disputed facts that, if found, would aggravate the sentence. Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources. Cf. Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 13–15, and n. 64 (1995) (estimating the costs of each capital case at around $1 million more than each noncapital case); Tabak, How Empirical Studies Can Affect Positively the Politics of the Death Penalty, 83 Cornell L. Rev. 1431, 1439–1440 (1998)

(attributing the greater cost of death penalty cases in part to bifurcated proceedings). In the context of noncapital crimes, the potential need for a second indictment alleging aggravating facts, the likely need for formal evidentiary rules to prevent prejudice, and the increased difficulty of obtaining relevant sentencing information, all will mean greater complexity, added cost, and further delay. See Part V, *infra*. Indeed, cost and delay could lead legislatures to revert to the complex charge offense system described in Part I–C–1, *supra*.

The majority refers to an *amicus curiae* brief filed by the Kansas Appellate Defender Office, which suggests that a two-jury system has proved workable in Kansas. *Ante,* at 13–14. And that may be so. But in all likelihood, any such workability reflects an uncomfortable fact, a fact at which the majority hints, *ante,* at 14, but whose constitutional implications it does not seem to grasp. The uncomfortable fact that could make the system seem workable—even desirable in the minds of some, including defense attorneys—is called "plea bargaining." See Bibas, 110 Yale L. J., at 1150, and n. 330 (reporting that in 1996, fewer than 4% of adjudicated state felony defendants have jury trials, 5% have bench trials, and 91% plead guilty). See also *ante,* at 14 (making clear that plea bargaining applies). The Court can announce that the Constitution requires at least two jury trials for each criminal defendant—one for guilt, another for sentencing—but only because it knows full well that more than 90% of defendants will not go to trial even once, much less insist on two or more trials.

What will be the consequences of the Court's holding for the 90% of defendants who do not go to trial? The truthful answer is that we do not know. Some defendants may receive bargaining advantages if the increased cost of the "double jury trial" guarantee makes prosecutors more willing to cede certain sentencing issues to the defense.

Other defendants may be hurt if a "single-jury-decides-all" approach makes them more reluctant to risk a trial—perhaps because they want to argue that they did not know what was in the cocaine bag, that it was a small amount regardless, that they were unaware a confederate had a gun, etc. See Bibas, 110 Yale L. J., at 1100 ("Because for many defendants going to trial is not a desirable option, they are left without any real hearings at all"); *id.,* at 1151 ("The trial right does little good when most defendants do not go to trial").

At the least, the greater expense attached to trials and their greater complexity, taken together in the context of an overworked criminal justice system, will likely mean, other things being equal, fewer trials and a greater reliance upon plea bargaining—a system in which punishment is set not by judges or juries but by advocates acting under bargaining constraints. At the same time, the greater power of the prosecutor to control the punishment through the charge would likely weaken the relation between real conduct and real punishment as well. See, *e.g.,* Schulhofer, 29 Am. Crim. L. Rev., at 845 (estimating that evasion of the proper sentence under the Federal Guidelines may now occur in 20%–35% of all guilty plea cases). Even if the Court's holding does not further embed plea-bargaining practices (as I fear it will), its success depends upon the existence of present practice. I do not understand how the Sixth Amendment could *require* a sentencing system that will work in practice only if no more than a handful of defendants exercise their right to a jury trial.

The majority's only response is to state that "bargaining over elements . . . probably favors the defendant," *ante,* at 15, adding that many criminal defense lawyers favor its position, *ante,* at 16. But the basic problem is not one of "fairness" to defendants or, for that matter, "fairness" to prosecutors. Rather, it concerns the greater fairness of a

sentencing system that a more uniform correspondence between real criminal conduct and real punishment helps to create. At a minimum, a two-jury system, by preventing a judge from taking account of an aggravating fact without the prosecutor's acquiescence, would undercut, if not nullify, legislative efforts to ensure through guidelines that punishments reflect a convicted offender's real criminal conduct, rather than that portion of the offender's conduct that a prosecutor decides to charge and prove.

Efforts to tie real punishment to real conduct are not new. They are embodied in well-established pre-guidelines sentencing practices—practices under which a judge, looking at a presentence report, would seek to tailor the sentence in significant part to fit the criminal conduct in which the offender actually engaged. For more than a century, questions of *punishment* (not those of guilt or innocence) have reflected determinations made, not only by juries, but also by judges, probation officers, and executive parole boards. Such truth-seeking determinations have rested upon both adversarial and non-adversarial processes. The Court's holding undermines efforts to reform these processes, for it means that legislatures cannot *both* permit judges to base sentencing upon real conduct *and* seek, through guidelines, to make the results more uniform.

In these and other ways, the two-jury system would work a radical change in pre-existing criminal law. It is not surprising that this Court has never previously suggested that the Constitution—outside the unique context of the death penalty—might require bifurcated jury-based sentencing. And it is the impediment the Court's holding poses to legislative efforts to achieve that greater systematic fairness that casts doubt on its constitutional validity.

D

Is there a fourth option? Perhaps. Congress and state

legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts. *Apprendi,* 530 U. S., at 541–542 (O'CONNOR, J., dissenting) (explaining how legislatures can evade the majority's rule by making yet another labeling choice). But political impediments to legislative action make such rewrites difficult to achieve; and it is difficult to see why the Sixth Amendment would require legislatures to undertake them.

It may also prove possible to find combinations of, or variations upon, my first three options. But I am unaware of any variation that does not involve (a) the shift of power to the prosecutor (weakening the connection between real conduct and real punishment) inherent in any charge offense system, (b) the lack of uniformity inherent in any system of pure judicial discretion, or (c) the complexity, expense, and increased reliance on plea bargains involved in a "two-jury" system. The simple fact is that the design of any fair sentencing system must involve efforts to make practical compromises among competing goals. The majority's reading of the Sixth Amendment makes the effort to find those compromises—already difficult—virtually impossible.

II

The majority rests its conclusion in significant part upon a claimed historical (and therefore constitutional) imperative. According to the majority, the rule it applies in this case is rooted in "longstanding tenets of common-law criminal jurisprudence," *ante,* at 5: that every accusation against a defendant must be proved to a jury and that "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason,'" *ibid.* (quoting Bishop, Criminal

Procedure §87, at 55). The historical sources upon which the majority relies, however, do not compel the result it reaches. See *ante,* at 10 (O'CONNOR, J., dissenting); *Apprendi,* 530 U. S., at 525–528 (O'CONNOR, J., dissenting). The quotation from Bishop, to which the majority attributes great weight, stands for nothing more than the "unremarkable proposition" that where a legislature passes a statute setting forth heavier penalties than were available for committing a common-law offense and specifying those facts that triggered the statutory penalty, "a defendant could receive the greater statutory punishment only if the indictment expressly charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up the common-law offense." *Id.,* at 526 (O'CONNOR, J., dissenting) (characterizing a similar statement of the law in J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)).

This is obvious when one considers the problem that Bishop was addressing. He provides as an example "statutes whereby, when [a common-law crime] is committed with a particular intent, or with a particular weapon, or the like, it is subjected to a particular corresponding punishment, heavier than that for" the simple common-law offense (though, of course, his concerns were not "*limited* to that example," *ante,* at 5–6, n. 5). Bishop, *supra,* §82, at 51–52 (discussing the example of common assault and enhanced-assault statutes, *e.g.,* "assaults committed with the intent to rob"). That indictments historically had to charge all of the statutorily labeled elements of the offense is a proposition on which all can agree. See *Apprendi, supra,* at 526–527 (O'CONNOR, J., dissenting). See also J. Archbold, Pleading and Evidence in Criminal Cases 44 (11th ed. 1849) ("[E]very fact or circumstance which is a necessary ingredient in the offence must be set forth in the indictment" so that "there may be no doubt as to the judgment which should be given, if the defendant be con-

victed"); 1 T. Starkie, Criminal Pleading 68 (2d ed. 1822) (the indictment must state "the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence").

Neither Bishop nor any other historical treatise writer, however, disputes the proposition that judges historically had discretion to vary the sentence, within the range provided by the statute, based on facts not proved at the trial. See Bishop, *supra,* §85, at 54 ("[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment"); K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998). The modern history of pre-guidelines sentencing likewise indicates that judges had broad discretion to set sentences within a statutory range based on uncharged conduct. Usually, the judge based his or her sentencing decision on facts gleaned from a presentence report, which the defendant could dispute at a sentencing hearing. In the federal system, for example, Federal Rule of Criminal Procedure 32 provided that probation officers, who are employees of the Judicial Branch, prepared a presentence report for the judge, a copy of which was generally given to the prosecution and defense before the sentencing hearing. See Stith & Cabranes, *supra,* at 79–80, 221, note 5. See also *ante,* at 2 (O'CONNOR, J., dissenting) (describing the State of Washington's former indeterminate sentencing law).

In this case, the statute provides that kidnaping may be punished by up to 10 years' imprisonment. Wash. Rev. Code Ann. §§9A.40.030(3), 9A.20.021(1)(b) (2000). Modern structured sentencing schemes like Washington's do not change the statutorily fixed maximum penalty, nor do

they purport to establish new elements for the crime. Instead, they undertake to structure the previously unfettered discretion of the sentencing judge, channeling and limiting his or her discretion even *within* the statutory range. (Thus, contrary to the majority's arguments, *ante,* at 12–13, kidnapers in the State of Washington know that they risk up to 10 years' imprisonment, but they also have the benefit of additional information about how long—within the 10-year maximum—their sentences are likely to be, based on how the kidnaping was committed.)

Historical treatises do not speak to such a practice because it was not done in the 19th century. Cf. *Jones,* 526 U. S., at 244 ("[T]he scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing"). This makes sense when one considers that, prior to the 19th century, the prescribed penalty for felonies was often death, which the judge had limited, and sometimes no, power to vary. See Lillquist, 82 N. C. L. Rev., at 628–630. The 19th century saw a movement to a rehabilitative mode of punishment in which prison terms became a norm, shifting power to the judge to impose a longer or shorter term within the statutory maximum. See *ibid.* The ability of legislatures to guide the judge's discretion by designating presumptive ranges, while allowing the judge to impose a more or less severe penalty in unusual cases, was therefore never considered. To argue otherwise, the majority must ignore the significant differences between modern structured sentencing schemes and the history on which it relies to strike them down. And while the majority insists that the historical sources, particularly Bishop, should not be *"limited"* to the context in which they were written, *ante,* at 5–6, n. 5, it has never explained why the Court *must* transplant those discussions to the very different context of sentencing schemes designed to structure judges' discretion within a statutory

sentencing range.

Given history's silence on the question of laws that structure a judge's discretion within the range provided by the legislatively labeled maximum term, it is not surprising that our modern, pre-*Apprendi* cases made clear that legislatures could, within broad limits, distinguish between "sentencing facts" and "elements of crimes." See *McMillan,* 477 U. S., at 85–88. By their choice of label, legislatures could indicate whether a judge or a jury must make the relevant factual determination. History does not preclude legislatures from making this decision. And, as I argued in Part I, *supra,* allowing legislatures to structure sentencing in this way has the dual effect of enhancing and giving meaning to the Sixth Amendment's jury trial right as to core crimes, while affording additional due process to defendants in the form of sentencing hearings before judges—hearings the majority's rule will eliminate for many.

Is there a risk of unfairness involved in permitting Congress to make this labeling decision? Of course. As we have recognized, the "tail" of the sentencing fact might "wa[g] the dog of the substantive offense." *McMillan, supra,* at 88. Congress might permit a judge to sentence an individual for murder though convicted only of making an illegal lane change. See *ante,* at 10 (majority opinion). But that is the kind of problem that the Due Process Clause is well suited to cure. *McMillan* foresaw the possibility that judges would have to use their own judgment in dealing with such a problem; but that is what judges are there for. And, as Part I, *supra,* makes clear, the alternatives are worse—not only practically, but, although the majority refuses to admit it, constitutionally as well.

Historic practice, then, does not compel the result the majority reaches. And constitutional concerns counsel the opposite.

III

The majority also overlooks important institutional considerations. Congress and the States relied upon what they believed was their constitutional power to decide, within broad limits, whether to make a particular fact (a) a sentencing factor or (b) an element in a greater crime. They relied upon *McMillan* as guaranteeing the constitutional validity of that proposition. They created sentencing reform, an effort to change the criminal justice system so that it reflects systematically not simply upon guilt or innocence but also upon what should be done about this now-guilty offender. Those efforts have spanned a generation. They have led to state sentencing guidelines and the Federal Sentencing Guideline system. *E.g., ante,* at 2–4 (O'CONNOR, J., dissenting) (describing sentencing reform in the State of Washington). These systems are imperfect and they yield far from perfect results, but I cannot believe the Constitution forbids the state legislatures and Congress to adopt such systems and to try to improve them over time. Nor can I believe that the Constitution hamstrings legislatures in the way that JUSTICE O'CONNOR and I have discussed.

IV

Now, let us return to the question I posed at the outset. Why does the Sixth Amendment permit a jury trial right (in respect to a particular fact) to depend upon a legislative labeling decision, namely, the legislative decision to label the fact a *sentencing fact*, instead of an *element of the crime?* The answer is that the fairness and effectiveness of a sentencing system, and the related fairness and effectiveness of the criminal justice system itself, depends upon the legislature's possessing the constitutional authority (within due process limits) to make that labeling decision. To restrict radically the legislature's power in this respect,

as the majority interprets the Sixth Amendment to do, prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution's greater fairness goals.

To say this is not simply to express concerns about fairness to defendants. It is also to express concerns about the serious practical (or impractical) changes that the Court's decision seems likely to impose upon the criminal process; about the tendency of the Court's decision to embed further plea bargaining processes that lack transparency and too often mean nonuniform, sometimes arbitrary, sentencing practices; about the obstacles the Court's decision poses to legislative efforts to bring about greater uniformity between real criminal conduct and real punishment; and ultimately about the limitations that the Court imposes upon legislatures' ability to make democratic legislative decisions. Whatever the faults of guidelines systems—and there are many—they are more likely to find their cure in legislation emerging from the experience of, and discussion among, all elements of the criminal justice community, than in a virtually unchangeable constitutional decision of this Court.

V

Taken together these three sets of considerations, concerning consequences, concerning history, concerning institutional reliance, leave me where I was in *Apprendi, i.e.,* convinced that the Court is wrong. Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion. At a minimum, the case sets aside numerous state efforts in that direction. Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how. As a result of today's decision, federal prosecutors, like state prosecutors, must decide what to do next,

how to handle tomorrow's case.

Consider some of the matters that federal prosecutors must know about, or guess about, when they prosecute their next case: (1) Does today's decision apply in full force to the Federal Sentencing Guidelines? (2) If so, must the initial indictment contain all sentencing factors, charged as "elements" of the crime? (3) What, then, are the evidentiary rules? Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay? Cf. *Crawford* v. *Washington,* 541 U. S. __, __, __–__ (2004) (slip op., at 27, 32–33) (clarifying the Sixth Amendment's requirement of confrontation with respect to testimonial hearsay). Are the numerous cases of this Court holding that a sentencing judge may consider virtually any reliable information still good law when juries, not judges, are required to determine the matter? See, *e.g., United States* v. *Watts,* 519 U. S. 148, 153–157 (1997) *(per curiam)* (evidence of conduct of which the defendant has been acquitted may be considered at sentencing). Cf. *Witte* v. *United States,* 515 U. S. 389, 399–401 (1995) (evidence of uncharged criminal conduct used in determining sentence). (4) How are juries to deal with highly complex or open-ended Sentencing Guidelines obviously written for application by an experienced trial judge? See, *e.g.,* USSG §3B1.1 (requiring a greater sentence when the defendant was a leader of a criminal activity that involved four or more participants or was "*otherwise extensive*" (emphasis added)); §§3D1.1–3D1.2 (highly complex "multiple count" rules); §1B1.3 (relevant conduct rules).

Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for

certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.

For the reasons given, I dissent.

Michigan Supreme Court
Lansing, Michigan

Opinion

FILED JULY 22, 2004

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v **No. 122696**

DEON LAMONT CLAYPOOL,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

TAYLOR, J.

The issue in this case is whether it is permissible for Michigan trial judges, sentencing under the legislative sentencing guidelines pursuant to MCL 769.34, to consider, for the purpose of a downward departure from the guidelines range, police conduct that is described as sentencing manipulation, sentencing entrapment, or sentencing escalation. These doctrines are based on police misconduct, which, alone, is not an appropriate factor to consider at sentencing. Rather, we hold that, pursuant to *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), if it can be objectively and verifiably shown that police conduct

or some other precipitating cause altered a defendant's intent, that altered intent can be considered by the sentencing judge as a ground for a downward sentence departure. Because information of this sort was noted by the sentencing judge in this case, but it is not clear that it was used properly, we vacate the decision of the Court of Appeals in part and remand this case to the trial court for resentencing or rearticulation on the record of the court's reasons for the departure.

I. FACTS AND PROCEDURAL BACKGROUND

This case arose from a series of sales of crack cocaine by defendant to an undercover police officer. An acquaintance of defendant's in the drug trade introduced him to an undercover officer as a potential customer. On March 8, 2001, the officer bought 28.35 grams of crack cocaine for $1,100. On March 12, 2001, he bought 49.2 grams for $2,000. Finally, on March 14, 2001, he bought 127.575 grams for $4,000. Defendant was arrested and charged with delivery of 50 or more, but less than 225, grams of cocaine, reflecting the third sale.

Defendant pleaded guilty to this charge.[1] The offense carries a statutorily mandated minimum sentence of ten years of imprisonment.[2] However, according to the legislative sentencing guidelines and the former MCL 333.7401(4),[3] the statutorily mandated minimum ten-year sentence for this offense can be reduced or "departed from," as it is described, if certain conditions set forth in MCL 769.34(3)[4] are met.

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[1] Defendant also pleaded guilty to charges concerning the first and second buys in the series and various other offenses that he committed during the time surrounding the series of buys. However, the present appeal involves only defendant's sentence for the third offense described above, delivery of 50 or more, but less than 225, grams of cocaine.

[2] Former MCL 333.7401(2)(a)(iii), in effect at the time of this action. See 1996 PA 249.

[3] See MCL 769.34(2)(a). When the trial court imposes a mandatory minimum sentence that exceeds the statutory sentencing guidelines range, it is not departing from the statutory sentencing guidelines. Thus, in this case, although the sentence imposed exceeds the recommended sentence range, the trial court does not have to articulate "substantial and compelling" reasons to justify its upward departure *from the guidelines*. However, because the trial court departed downward from the mandatory minimum, it must articulate such reasons to justify *this* downward departure from the mandatory minimum. See former MCL 333.7401(4).

[4] These conditions are:

> A court may depart from the appropriate sentence range established under the sentencing guidelines [MCL 777.1 *et seq.*] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

At the sentencing hearing, the defense requested a downward departure from the statutorily mandated ten-year minimum sentence on the bases that defendant has a limited criminal history (only one criminal conviction for misdemeanor retail fraud) for his age of twenty-six[5] and that he has an addiction to cocaine, which was costly and jeopardized his ability to pay for his home. In this case, defense counsel also argued that the police had manipulated defendant by making repeated purchases for increasing quantities of cocaine and that, by doing so, they "escalated" the sentence to which defendant would be subjected. In particular, defense counsel argued that the undercover police officer did not arrest defendant after either of the initial buys, but went back to him repeatedly

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> **(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.**
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> **(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3).]**

[5] **There was a dispute concerning whether defendant's age was twenty-six or twenty-nine at the time of the offenses, but resolution of this issue is not necessary to our analysis.**

to purchase cocaine. The defense argued that the officer even paid defendant at least $500 more than the going rate to persuade him to sell a larger quantity of crack cocaine than he otherwise would have sold.

The prosecutor countered that the officer had legitimate law enforcement reasons for the repeated purchases. Those reasons were that many usual sellers of large amounts only will sell small amounts to new buyers, and, thus, it is only by working up to larger amounts that law enforcement can in fact determine what type of seller the suspect is. The prosecutor, however, did not address the defense's distinct claim that no matter what the police motivation may have been, the fact that the police paid defendant $500 over the market price was the sole reason defendant's intent to sell changed from selling a lesser amount to selling a greater amount.

At the conclusion of these arguments, the trial court found substantial and compelling reasons to depart from the mandatory minimum sentence on the basis of defendant's age, minimal criminal history, and stable employment history of approximately two years, and, finally, on the basis of the fact that, in the court's view, defendant had been "escalated" and precluded from getting substance abuse treatment earlier. The trial court did not indicate if the compelling nature of this escalation factor was the view that the police conduct itself was somehow offensive or

that the police had overcome the will of a small dealer by the lure of more money and created a greater criminal out of someone who otherwise would have remained a lesser criminal. The court then departed downward two years from the statutorily mandated minimum sentence of ten years and sentenced defendant to eight to twenty years of imprisonment.

The prosecutor appealed and the Court of Appeals affirmed, holding that all but one of the stated reasons of the trial court, defendant's employment, were substantial and compelling reasons for a downward departure.[6] In a brief analysis, the Court agreed with the trial court's decision to depart downward on the basis of "escalation," citing *People v Shinholster*, 196 Mich App 531; 493 NW2d 502 (1992). Citing the short treatment of this issue in *Shinholster, supra* at 535, the Court stated that "while not constituting entrapment, purposeful[] escala[tion] [of] the defendant's crime" is a permissible reason for a downward departure from a mandatory minimum sentence. Slip op at 2. The Court of Appeals also noted that in *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995), "three of the four

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[6] Unpublished opinion per curiam, issued October 18, 2002 (Docket No. 238984).

justices in the majority agreed that [escalation] was a permissible factor to consider . . . ." Slip op at 2 n 3.[7]

This Court granted the prosecutor leave to appeal. We framed the issues on appeal as

whether "sentencing manipulation" or "escalation" is a substantial and compelling reason justifying a downward departure from a statutorily imposed mandatory minimum sentence, and whether a trial court may consider the legislative sentencing guidelines recommendation when determining the degree of a departure, which has already been determined to be supported by substantial and compelling reasons. [468 Mich 944 (2003).][8]

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[7] Specifically, the *Fields* Court stated in reference to *Shinholster*:

> [T]he Court found that the government's actions, although not rising to the level of entrapment, purposefully escalated the crime. This last factor is of particular importance in our approval of the resolution reached in Shinholster. As a mitigating circumstance surrounding the offense, it weighs heavily in favor of a deviation [departure] from the statutory minimum. [Fields, supra at 79.]

However, the present Court of Appeals panel properly pointed out that this was merely a plurality decision without binding effect because the fourth justice signing the lead opinion, Justice Boyle, authored a concurring opinion in which she refused to approve of the lead opinion's discussion of *Shinholster*. *Fields*, *supra* at 81-82.

[8] Both parties agree that, with respect to the latter issue presented on appeal, the trial court did not impermissibly consider the legislative guidelines in the manner described here. Thus, neither party requests relief

II. STANDARD OF REVIEW

To decide whether sentencing manipulation, sentencing entrapment, or sentencing escalation could ever be a substantial and compelling reason for a departure as a matter of law, we must interpret the former MCL 333.7401(4) and the general legislative sentencing guidelines provision in MCL 769.34(3). Statutory interpretation is subject to review de novo. *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003). A trial court's decision that a particular factor is sufficiently substantial and compelling for a departure is reviewed for an abuse of discretion. *Babcock*, *supra* at 269-270.

III. ANALYSIS

In Michigan, the Legislature has established sentencing guidelines. See MCL 769.31 *et seq*. The underlying approach of the guidelines is that the person to be sentenced is first placed in a narrow sentencing compartment based on rigid factors surrounding the offense and offender variable statuses. Then the individual is eligible to be removed from such "default" compartments on the basis of individualized factors. See *Babcock*, *supra* at 263-264. In cases involving controlled substances,

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on this issue, and the issue is moot. See *Crawford v Dep't of Civil Service*, 466 Mich 250, 261; 645 NW2d 6 (2002) ("'An issue is moot where circumstances render it impossible for the reviewing court to grant any relief.'" [Citation omitted.]).

however, the Legislature has also established statutorily mandated minimum sentences. See the former MCL 333.7401. Under both provisions, MCL 769.34(3) and the former MCL 333.7401(4), departure from a guidelines range or mandatory sentence is permissible. See MCL 769.34(2)(a). All these provisions allow a downward departure if the court has a "substantial and compelling reason" for the departure. This Court has determined that this statutory language means that there must be an "'objective and verifiable' reason that 'keenly or irresistibly grabs our attention'; is of 'considerable worth' in determining [the appropriate sentence]; and 'exists only in exceptional cases.'"[9] ***Babcock***, ***supra*** **at 257-258, quoting** ***Fields***, ***supra*** **at 62, 67-68.**

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[9] **Although some individualized factors may not, in the final analysis, constitute a sufficiently "substantial and compelling" basis for moving a person outside the original compartment, that should not preclude the trial court from considering whatever individualized factors that it sees as relevant. While it is possible, as the Chief Justice argues, that some factors can never be "substantial and compelling" because they can never be objective and verifiable, we are reluctant to characterize too many factors in this way because there are simply too many combinations of factual circumstances for us to feel confident in forever precluding consideration of some particular factor. As a practical matter, it also seems that the upshot of the Chief Justice's viewpoint is that everything will have to be litigated twice through the appellate process—first, to address whether a factor is one that can ever be "substantial and compelling," and, second, to consider whether it is "substantial and compelling" in the circumstances of a specific case. One of the virtues of the majority position is that it would sharply reduce the first of these classes of litigation.**

It is clear from the legislative sentencing guidelines that, as discussed in *Babcock*, *supra* at 263-264, the focus of the guidelines is that the court is to consider *this* criminal and *this* offense. As *Babcock* said after discussing the roots of our nation's attachment to the concept of proportionality in criminal sentencing: "The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *Id.* at 263.

Because of this approach, police misconduct, on which the doctrines of sentencing manipulation, sentencing entrapment, and sentencing escalation are based,[10] is not an

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[10] **The federal definition of sentencing manipulation can be found in *United States v Shephard*, 4 F3d 647, 649 (CA 8, 1993). The United States Court of Appeals for the Eighth Circuit held that sentencing manipulation occurs when "the government stretche[s] out the investigation merely to increase the sentence [a defendant] would receive." Although Michigan has not defined sentencing manipulation by case law, a majority of state courts addressing the issue has adopted similar language as the functioning definition of the term. See, e.g., *People v Smith*, 31 Cal 4th 1207, 1211-1212; 7 Cal Rptr 3d 559; 80 P3d 662 (2003).**

Sentencing *entrapment* has been discussed by our Court of Appeals in *People v Ealy*, 222 Mich App 508, 510-511; 564 NW2d 168 (1997). There, the Court of Appeals referred to the definition from the United States Court of Appeals for the Ninth Circuit: "[S]entencing entrapment occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment." *United States v Staufer*, 38 F3d 1103, 1106 (CA 9, 1994) (citations and quotation marks omitted.

appropriate factor to consider at sentencing. Police misconduct, standing alone, tells us nothing about the defendant. However, if the defendant has an enhanced intent that was the product of police conduct or any other precipitating factor, and the enhanced intent can be shown in a manner that satisfies the requirements for a sentencing departure as outlined in *Babcock*, it is permissible for a court to consider that enhanced intent in making a departure.[11]

In the cases discussing sentencing manipulation and sentencing entrapment, reference is occasionally made to sentencing "escalation." No Michigan case has defined this term, nor has any other court of which we are aware. However, we believe that contextually, sentencing escalation can mean either sentencing manipulation or sentencing entrapment, as defined above.

The Chief Justice states that the substantive defense of entrapment is akin to the sentencing entrapment doctrine. This is not the case. The substantive defense of entrapment in Michigan is a complete bar to prosecution. See *People v Johnson*, 466 Mich 491, 493-494, 498; 647 NW2d 480 (2002). The doctrine of sentencing entrapment, as defined in the federal courts, merely allows a downward departure from a sentence. Thus, the two concepts have distinct effects—dismissal of the charges on one hand versus a (perhaps slightly) lower sentence on the other.

[11] **A sentencing departure may be from either a sentence under a sentencing guidelines range or a statutorily mandated minimum sentence. Although *Babcock* is primarily concerned with the sentencing guidelines, its reasoning is equally applicable to this statutorily mandated minimum sentence case. See *id.* at 257 (acknowledging applicable statutorily mandated minimum sentences and citing *Fields* as a mandatory minimum case).**

IV. APPLICATION TO THIS CASE

The trial court in this case concluded, without more, that the defendant was "escalated." It is not clear whether the court was thinking about defendant's intent or the police conduct. Thus, resentencing or rearticulation of the court's reasons for departure on this factor is required because, under MCL 769.34(3), "it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record." *Babcock*, *supra* at 258 (emphasis in original). Moreover, a trial court must articulate on the record a substantial and compelling reason why its *particular* departure was warranted. *Id.* at 259-260. The trial court is instructed to do this on remand.

Further, we hold that two of the other reasons for departure that the trial court articulated are not substantial and compelling: (1) defendant's employment for two years, and (2) that at defendant's age of twenty-six years he had only one previous criminal conviction.

With regard to the employment factor, we agree with the Court of Appeals that "defendant's employment as a taxi cab driver . . . for a period of less than two years . . . does not 'keenly' or 'irresistibly' grab one's attention and, therefore, does not warrant a downward departure."

Slip op at 2, quoting *Fields*, *supra* at 67. Thus, we affirm the Court of Appeals on this issue.

Nor does the fact that defendant only had one previous criminal conviction (misdemeanor retail fraud) until he reached the age of twenty-six[12] "'keenly' or 'irresistibly' grab[] our attention." *Babcock*, *supra* at 257-258, quoting *Fields, supra* at 67. The trial judge stated that he was "impressed" that defendant had made it to the advanced age of twenty-six with only one previous criminal conviction of a minor nature. We are not. We do not believe that the age of twenty-six is particularly old to not yet have a more lengthy criminal record. Thus, the trial court abused its discretion in this regard. *Babcock*, *supra* at 269-270.

If a trial court articulates multiple reasons for departure, some of which are substantial and compelling and some of which are not, and the appellate court cannot determine if the sentence departure is sustainable without the offending factors, remand is appropriate. *Id*. at 260-261.[13] Accordingly, we remand this case for resentencing or

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[12] **Our analysis holds even if defendant were actually twenty-nine at the time of these offenses. See n 5.**

[13] **The Court of Appeals failed to adhere to this directive by failing to consider whether the trial court would have departed and would have departed to the same degree without the employment factor that the Court of Appeals found to be insubstantial and noncompelling. Thus, even if the Court of Appeals properly deemed "escalation" to be a substantial and compelling factor for departure in this case, the Court should have considered whether the trial court's departure was sustainable without the**

rearticulation on the record of the trial court's reasons for departure. On remand, defendant may argue any factor left unaddressed by our decision today, and, under the standards of *Babcock*, that his intent in committing the crime was also a proper factor for consideration.

V. THE CHIEF JUSTICE'S OPINION

The Chief Justice is in agreement with our holding that police conduct alone cannot be considered at sentencing, and she is in agreement with the result of remanding for resentencing in this case. However, the Chief Justice disagrees with part of our rationale and contends that we are employing the subjective factor of intent to determine whether a sentencing departure is warranted in a particular case.

That is, she believes that because intent is subjective, it can never be shown to have been altered in an objective and verifiable way. We disagree. For example, if under surveillance a defendant is importuned to sell more of an illegal substance than he wished and it is clear that he would not have sold it absent the buyer's pleas to do so, the tape of their conversations could well establish in an objective and verifiable fashion the change in the defendant's intent. Similarly, if there is evidence

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offending factor of employment, and, if the Court could not do so, it should have remanded the case to the trial court for resentencing or rearticulation of the reasons for departure.

that after a physical assault the assailant helped the victim by securing medical assistance, this could establish objectively and verifiably an immediate repudiation of his previous criminal intent. This is all to say that the trial court cannot depart from the mandatory minimum sentence or guidelines sentence without basing its decision on some actual facts external to the representations of the defendant himself. While objectively and verifiably showing an altered intent will not be easy, nevertheless, we do not believe that the Legislature's statutory sentencing scheme forecloses outright the consideration of a defendant's altered intent at sentencing.

Moreover, we do not consider the intent element of this crime to be "nullified" by allowing a trial judge to consider altered intent as a factor for sentence departure, as the Chief Justice states, *post* at 5. The crime of delivery of a controlled substance of a particular amount is a general intent crime. See *People v Mass*, 464 Mich 615, 627; 628 NW2d 540 (2001). Thus, the only intent required to be convicted of the offense is the intent to deliver a controlled substance. The accused need not have the intent to sell a particular amount of the substance. Rather, that a particular amount was in fact sold is sufficient to convict the accused of delivery of that amount under the statute. See *id.* at 626, citing *People v Quinn*, 440 Mich 178, 189; 487 NW2d 194 (1992).

Therefore, our approach does not nullify an element of the offense. The element of intent to sell drugs is left untouched; indeed, defendant himself admitted that he sold drugs. However, defendant's intent concerning the amount of drugs he sold may have been altered in this case when the police repeatedly returned to him to buy ever-increasing amounts, if those amounts were in fact greater than what defendant originally intended to sell.

The Chief Justice asserts that by considering the defendant's intent at the time of sentencing we are evading the Legislature's determination that the specific intent of the individual not be considered for the purpose of conviction. Yet, we are not doing that. We are considering the defendant's intent for the purpose of sentencing. It seems obvious that the sentencing stage is different from the trial stage. Indeed, the latitude for the trial court in sentencing to consider things inadmissible at trial can be found in the Legislature's requirements of what a presentence report can contain. A presentence report prepared pursuant to MCL 771.14 can include hearsay, character evidence, prior convictions, and alleged criminal activity for which the defendant was not charged or convicted. Moreover, the sentencing guidelines themselves, MCL 769.34(3), use this approach by empowering the trial court to consider virtually *any* factor that meets the substantial and compelling standard. Certainly this

encyclopedic grant allows the consideration of matters broader than those matters already before the court at trial, because if it did not, the statute would be conveying no greater authority than that previously possessed. Such a construction of the statute, a construction that makes the statute meaningless, should be avoided. See *Sweatt v Dep't of Corrections*, 468 Mich 172, 183; 661 NW2d 201 (2003).[14]

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[14] **The Chief Justice argues that the United States Supreme Court's recent decision in *Blakely v Washington*, 542 US ___; 124 S Ct ___; ___ L Ed 2d ___ (2004), affects this case. We disagree. *Blakely* concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge. Thus, the trial judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact-finding. This offended the Sixth Amendment, the United States. Supreme Court concluded, because the facts that led to the sentence were not found by the jury. *Blakely*, *supra* at ___.**

Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8. The minimum is based on guidelines ranges as discussed in the present case and in *Babcock*, *supra*. The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding). Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment.

Justice O'Connor in her dissent in *Blakely* raised a concern similar to the one the Chief Justice now raises, but the majority in that case made clear that the decision

VI. CONCLUSION

In light of the applicable sentencing statutes and our recent decision in *Babcock*, we vacate the decision of the Court of Appeals in part and remand this case to the trial court for resentencing or rearticulation of the court's reasons for departure, consistent with this opinion.

Clifford W. Taylor
Stephen J. Markman

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did not affect indeterminate sentencing systems. The Court stated:

> **JUSTICE O'CONNOR argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post*, at 1-10. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.* It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [*Blakely*, *supra* at ___ (emphasis added).]**

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v **No. 122696**

DEON LAMONT CLAYPOOL,

Defendant-Appellee.

CORRIGAN, C.J. (*concurring in part and dissenting in part*).

Although I agree with the result of the majority's decision, I cannot agree with its analysis. Any sentencing departure that endorses an inherently subjective factor such as the defendant's intent cannot satisfy our Legislature's requirement that any sentencing departures be based on objective and verifiable factors. I continue to believe that sentencing escalation or entrapment is merely the entrapment defense asserted at sentencing rather than before trial and that these related concepts have no valid legal foundation. Further, I agree with the majority that the recent United States Supreme Court decision in *Blakely v Washington*, 542 US ___ ; ___ 124 S Ct ___ ; ___ L Ed 2d ___ (2004), does not invalidate Michigan's indeterminate sentencing scheme as a whole. Nonetheless, the majority's

sweeping language regarding judicial powers to effect departures (not limited to downward departures) will invite challenges to Michigan's scheme; it appears to conflict with principles set out in *Blakely*.

I. BACKGROUND

The concepts of "sentencing entrapment" or "escalation" originated in the federal circuit courts of appeals as arguments in support of a departure from the federal sentencing guidelines. See United States v Lenfesty, 923 F2d 1293, 1300 (CA 8, 1991) ("We are not prepared to say there is no such animal as 'sentencing entrapment.' Where outrageous official conduct overcomes the will of an individual predisposed only to dealing in small quantities, this contention might bear fruit."); United States v Staufer, 38 F3d 1103, 1108 (CA 9, 1994) ("We are persuaded that 'sentencing entrapment may be legally relied upon to depart under the Sentencing Guidelines,' . . . [citing United States v Barth, 990 F2d 422, 424 (CA 8, 1993)]."). Sentencing entrapment "occurs when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.'" Staufer, supra at 1106, citing United States v Stuart, 923 F2d 607, 614 (CA 9, 1991).

In Michigan, the concept of sentencing entrapment or escalation was first approved in *People v Shinholster*, 196 Mich App 531; 493 NW2d 502 (1992). In *Shinholster,* the Court of Appeals approved of the consideration of sentencing "escalation" in departing from a mandatory minimum sentence, holding that among those factors authorizing a departure was "that the government's actions—although not rising to the level of entrapment—purposefully escalated the crime." *Id.* at 535.

The theory of "escalation" was again discussed in *People v Ealy,* 222 Mich App 508; 564 NW2d 168 (1997). In *Ealy*, the defendant argued that "the police committed sentencing entrapment by wrongfully inducing him to participate in transactions involving escalating amounts of cocaine and exposing him to greater penalties." *Id.* at 510. The Court in *Ealy* applied the current objective test for entrapment to the "escalation" claim:

> **In Michigan, entrapment is analyzed according to a two-pronged test, with entrapment existing if either prong is met. The court must consider whether (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. [*Id.*]**

The Court in *Ealy* also quoted the federal circuit test for sentencing entrapment and held that the facts in the case

did not support application of the theory because the police did nothing more than present defendant with the opportunity to commit the offenses at issue. *Id.* at 510-511. The Court stated that "the delay in [the defendant's] arrest was justified on the ground that an earlier arrest would have impaired the ability of the police to conduct an ongoing undercover narcotics investigation." *Id.* at 511.

The only precedent from this Court involving the concept of sentencing escalation is *People v Fields*, 448 Mich 58, 79; 528 NW2d 176 (1995), in which three justices approved of the adoption in *Shinholster* of the concept of "escalation" as a mitigating factor surrounding an offense.[1]

Thus, the entrapment defense and the concept of sentencing entrapment or escalation are two sides of the same coin. The effect of the entrapment defense is to absolve of responsibility those whose conduct the Legislature has deemed criminal, and the effect of sentencing entrapment or escalation is to partially absolve of responsibility those whose conduct the Legislature has

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[1] **Justice BOYLE concurred, but declined to join in the approval of *Shinholster*, stating that it was**

> **dicta with a vengeance. The question whether defendant's successive criminal acts not involving police entrapment can amount to a mitigating circumstance is far too significant to be resolved in the context of a record that does not present that question. [*Id.* at 82 n 1.]**

determined warrants a specific minimum penalty. The similarity of the two concepts can be seen in *Ealy*, in which the Court of Appeals applied the general entrapment test in evaluating the defendant's claim of sentencing escalation.

Indeed, sentencing entrapment or escalation is often used to effectively nullify an element of a crime for which the defendant was convicted by purporting to lessen or eliminate the defendant's intent. This is no different than the application of the entrapment defense before trial. Evidence regarding the nature and extent of defendant's intent is only a proper subject for the case-in-chief, when determining whether the elements of a crime have been established. Reviewing a defendant's subjective intent at sentencing can amount to a nullification of a conviction, or at least an element of a crime, without procedural protections.

In cases in which only a general intent is required, the Legislature has already determined that the specific intent of the individual defendant is irrelevant for the purpose of a conviction. If the intent is irrelevant at the initial stage for the purpose of the conviction, it cannot be used at sentencing as an end-run around the Legislature's decision. Here, the Legislature determined

that those who intend to distribute drugs assume the risk of punishment according to the amount distributed. It is not for this Court to make a different policy decision upon sentencing.

II. The Validity of the Entrapment Defense

For the reasons stated in my dissenting statement in *People v Maffett*, 464 Mich 878 (2001), I believe that the judicially crafted entrapment defense—in all its forms—is without constitutional foundation. Once a "defendant has engaged in conduct constituting all the elements of a criminal offense, as defined by the Legislature," this Court does not then have the authority to conclude that the Legislature did not intend that the defendant be punished or that the prosecution should be barred as a matter of policy. *Id.* at 895. To do so runs afoul of settled principles of statutory interpretation as well as principles of separation of powers. *Id.* at 895-896.

Sentencing entrapment or escalation is no different. Once a defendant has committed an offense that the Legislature has determined requires a certain minimum punishment, this Court lacks any authority to determine that the Legislature did not really "mean" to apply that punishment to the defendant or that the legislatively mandated punishment should not be applied as a matter of

policy. "The regulation of law enforcement practices involved in the investigation and detection of crime falls within the police power of the legislative branch," not within the implied judicial powers or rulemaking authority of this Court under Const 1963, art 6, §§ 1, 5. *Id.* at 897-898. Just as "[t]he assignment of criminal responsibility is undeniably a matter of substantive law" reserved for the Legislature, *id.* at 898, so is the allocation of criminal punishment. For this Court to refuse to apply a legislatively mandated minimum sentence would impermissibly usurp both the legislative and executive functions, in violation of Const 1963, art 3, § 2.

Both the general entrapment defense and the concept of sentencing entrapment or escalation require a court to "disregard the law" and bar prosecution or the imposition of punishment if the court forms the opinion that the crime has been instigated or escalated by government officials. See *id.* at 898. The judicial branch lacks the authority to disregard the law or supervise law enforcement procedure. Therefore, the general entrapment defense and the concept

of sentencing entrapment and escalation are without valid legal foundations and should be abrogated.[2]

III. Sentencing Entrapment or Escalation and Our Legislatively Mandated Sentencing Scheme

As this Court noted in *People v Babcock,* 469 Mich 247, 255-256; 666 NW2d 231 (2003), the promulgation of statutory sentencing guidelines has changed the legal landscape:

> **Under the statutory sentencing guidelines, a departure is only allowed by the Legislature if there is a "substantial and compelling reason" for doing so. MCL 769.34(3). Accordingly, since the enactment of the statutory sentencing guidelines, the role of the trial court has necessarily been altered. Before the enactment of these guidelines, the trial court was required to choose a sentence within the statutory minimum and maximum that was "proportionate to the seriousness of the circumstances surrounding the offense and the offender." [*People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990)]. Following the enactment of these guidelines, the trial court is required to choose a sentence within the guidelines range, unless there is a "substantial and compelling" reason for departing from this range. Consequently . . . the role of the Court of Appeals has also changed from reviewing the trial court's sentencing decision for "proportionality" to reviewing the trial court's**

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[2] **The majority mischaracterizes my position as agreeing with the notion that "police conduct alone cannot be considered at sentencing . . . ." Ante at 15. My position, however, is broader than that. As previously explained, I disagree with the concept of sentencing entrapment or escalation altogether regardless whether such "entrapment" or "escalation" resulted from police conduct alone or police conduct and some other factor. It is the very notion of sentencing entrapment and escalation with which I disagree and which is without any valid legal foundation, not the fact that such "entrapment" or "escalation" ultimately stems from police conduct.**

> **sentencing decision to determine, first, whether it is within the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a "substantial and compelling" reason for departing from such range.**

For a reason to be "substantial and compelling," it must be "objective and verifiable." ***Id.*** **at 257-258.**

Although the majority attempts to conform to the legislative requirements by requiring objective and verifiable proof that police conduct (or any other general cause) influenced the defendant's intent, the fact remains that the departure is, in fact, based on the defendant's intent, which is an inherently *subjective* factor. I cannot fathom how a person's subjective intent can ever be considered objective or verifiable.

"Intent" is defined as "the state of a person's mind that directs his or her actions toward an objective." ***Random House Webster's College Dictionary*** **(1997). The state of a defendant's mind is an inherently subjective factor and cannot suffice as an objective and verifiable factor for a sentencing departure. Subjective intent or motivation cannot satisfy *Babcock*, no matter how "objectively" the defendant presents his version of the state of his mind. Therefore, the concept of sentencing**

entrapment or escalation is at odds with our legislatively mandated sentencing scheme.[3]

In addition, although I agree with the majority that *Blakely, supra,* does not invalidate our sentencing scheme, I question the majority's sweeping statements in section V of its opinion responding to my dissent. The majority states that the Legislature has provided sentencing courts latitude to consider factors inadmissible at trial. *Ante* at 17. The majority also opines that such latitude is evident from the Legislature's directive regarding what information may be included in a presentence report. The majority continues:

> **A presentence report prepared pursuant to MCL 771.14 can include hearsay, character evidence, prior convictions, and alleged criminal activity for which the defendant was not charged or convicted. Moreover, the sentencing guidelines themselves, MCL 769.34(3), use this approach by empowering the trial court to consider virtually *any* factor that meets the substantial and compelling standard. Certainly this encyclopedic grant allows the consideration of matters broader than those matters already before the court at trial, because if it did not,**

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[3] **To the extent that the majority is actually talking about a defendant's motive, and not intent, there may be situations in which objective and verifiable evidence of motive will keenly and irresistibly grab the court's attention and justify a sentencing departure. Under the facts of this case, however, I question how defendant's subjective decision to sell drugs of varying amounts from his employer's vehicle on company time can be considered an objective and verifiable factor that keenly or irresistibly grabs the court's interest.**

> **the statute would be conveying no greater authority than that previously possessed. [*Ante* at 17-18.]**

Although I agree that *Blakely* does not implicate our sentencing scheme, the full scope of the *Blakely* decision has yet to be determined. Given the response to *Blakely*, it appears likely that the issue of mandatory minimum sentences will need to be settled. See Laurie P. Cohen and Gary Fields, *High-Court Ruling Unleashes Chaos Over Sentencing*, The Wall Street Journal, July 14, 2004. Given the lack of any definitive statement by the United States Supreme Court regarding mandatory minimum sentences, I believe that sweeping statements of broad judicial authority, like those quoted above, may serve only to borrow trouble. The majority's broad assertions of judicial power are not necessary to the disposition of this case and may unnecessarily subject our sentencing scheme to future criticism. In short, although Michigan's sentencing scheme is not currently affected by *Blakely,* I believe the wisest course is to act circumspectly to avoid making our scheme vulnerable when the time inevitably comes to evaluate mandatory minimum sentencing schemes.

IV. APPLICATION

MCL 333.7401(2)(a)(iii), at the time of this action, provided for a mandatory minimum sentence of ten years for

this sort of drug offense. Former MCL 333.7401(4) provided that the court could depart from the minimum term of imprisonment "if the court finds on the record that there are substantial and compelling reasons to do so." Again, we noted in *Babcock* that "substantial and compelling" was a legal term of art that required, among other things, that the reason be objective and verifiable.[4]

The finding of sentencing entrapment or escalation here was based solely on the trial court's subjective assessment of the defendant's subjective intent. This finding cannot be considered objective and verifiable, and

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[4] **MCL 769.34(2)(a) provides, in relevant part:**

> **If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure *under this section*. [Emphasis added.]**

Although the sentence after departure here did exceed the recommended sentencing guidelines range, it is irrelevant that the sentence would not be considered a departure under MCL 769.34 because former MCL 333.7401(4) imposed a separate requirement that the departure be supported by substantial and compelling reasons.

so the departure from the mandatory minimum sentence cannot be considered valid under MCL 333.7401(4). Therefore, I agree that resentencing is required.

V. CONCLUSION

The judicially created entrapment defense and the concepts of sentencing entrapment and escalation have no valid legal foundation. Reviewing a defendant's subjective intent at sentencing amounts to a nullification of a conviction, or possibly of an element of a crime, without procedural protections. Further, any departure based on sentencing entrapment or escalation is necessarily based on the defendant's subjective intent and, thus, cannot be considered objective and verifiable. Therefore, departures based on the concept of sentencing entrapment or escalation violate the statutory requirements for a sentencing departure.

Maura D. Corrigan

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v **No. 122696**

DEON LAMONT CLAYPOOL,

Defendant-Appellee.

CAVANAGH, J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that a sentencing judge may consider whatever individualized factors the judge believes are relevant. I also agree with the majority's determination that *Blakely v Washington*, 542 US __; 124 S Ct __; __ L Ed 2d __ (2004), does not appear to affect scoring systems that establish recommended *minimum* sentences, such as we have in Michigan. Moreover, I tend to agree with the lead opinion's ultimate rationale. The lead opinion notes that sentencing entrapment and sentencing manipulation are distinct theories. However, the lead opinion then concludes that the same test is to be employed in cases of sentencing entrapment and in cases of

sentencing manipulation. I must respectfully disagree with such an approach.

In *United States v Lora*, 129 F Supp 2d 77, 89-90 (D Mass, 2001), the court aptly noted:

> **Some courts and scholars, however, distinguish between sentencing factor manipulation and sentencing entrapment. . . . Under this approach, sentencing factor manipulation may exist regardless of the defendant's predisposition. The doctrine focuses exclusively on the motives of law enforcement authorities in manipulating the sentence, as when an agent delays an arrest with the purpose of increasing the defendant's sentence. . . . One commentator illustrated the distinction:**
>
> > **"An example of 'sentencing entrapment' would be when a government agent offers a kilogram of cocaine to a person who has previously purchased only gram or 'user' amounts, for the purpose of increasing the amount of drugs for which he ultimately will be held accountable. On the other hand, an example of 'sentencing manipulation' would be when an undercover agent continues to engage in undercover drug purchases with a defendant, thereby stretching out an investigation which could have concluded earlier, for the sole purpose of increasing the defendant's sentencing exposure, or when an undercover agent insists that a defendant 'cook' powder cocaine into 'crack,' well-knowing that sentences for dealing in crack are significantly higher than sentences for dealing in powder cocaine."**
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> **Amy Levin Weil, "In Partial Defense of Sentencing Entrapment," 7 Fed. Sentencing Rep. 172, 174 (1995) (footnotes omitted). In any event, the sentencing entrapment and manipulation doctrines both require a finding of improper motive on the part of the government before a departure is warranted.**

Rather than vacating and remanding, I would simply affirm the decision of the Court of Appeals. The trial court stated on the record that the downward departure was based on substantial and compelling reasons that were objective and verifiable. On appeal, the Court of Appeals affirmed and specifically found that the stated reason for departure at issue here, sentencing manipulation (also referred to as sentencing escalation), was substantial and compelling, as well as objective and verifiable. The panel noted, "Thus, it objectively appears that the police made additional purchases that resulted in escalating the seriousness of the offenses of which defendant was convicted. This fact is verified in the PSIR . . . ." Unpublished opinion per curiam, issued October 18, 2002 (Docket No. 238984), p 3. Because I believe such determinations to have been proper and, thus, the test set forth in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), was met, I would affirm the decision of the Court of Appeals.

Michael F. Cavanagh

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v **No. 122696**

DEON LAMONT CLAYPOOL,

Defendant-Appellee.

WEAVER, J. (*dissenting in part and concurring in part*).

I respectfully dissent from the majority's decision to vacate the Court of Appeals decision and remand this case for resentencing. Consistent with my opinions in *People v Daniel*[1] and *People v Babcock*,[2] I would consider all relevant factors, including police conduct, when determining whether there is a substantial and compelling reason to depart from the sentencing guidelines ranges, and I would not limit how the factor of police conduct may be considered.[3]

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[1] ***People v Daniel*, 462 Mich 1, 22-23; 609 NW2d 557 (2000)(Weaver, C.J., dissenting).**

[2] ***People v Babcock*, 469 Mich 247, 280-284; 666 NW2d 231 (2003)(Weaver, J., dissenting in part and concurring in part).**

[3] **The majority holds that while police misconduct may not be considered, an "enhanced intent" that results from**

Applying the reasoning of my opinion in *Babcock* to the facts of this case, I would conclude that the trial court did not abuse its discretion in departing downward from the sentencing guidelines range because the trial court's sentence in this case was within the principled range of outcomes.[4] Therefore, I would affirm the Court of Appeals decision affirming defendant's sentence.

But I concur in the majority's conclusion that the United States Supreme Court's decision in *Blakely v Washington*, 542 US ___; 124 S Ct ___; ___L Ed 2d ___ (2004), which considered whether facts that increase the penalty for a crime beyond the prescribed statutory maximum sentence must be submitted to the jury, does not affect Michigan's scoring system, which establishes the recommended *minimum* sentence.

Elizabeth A. Weaver

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police misconduct may be considered when determining whether to depart from the guidelines ranges. *Ante* at 1, 11-12. The majority opinion does not explain how sentencing courts are to distinguish practically between police misconduct, which is an impermissible consideration under its analysis, and the "enhanced intent" that results from police misconduct, which is a permissible consideration under its analysis.

[4] *Babcock, supra* at 282-283.

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v **No. 122696**

DEON LAMONT CLAYPOOL,

Defendant-Appellee.

YOUNG, J. (*concurring in part and dissenting in part*).

I concur with the majority opinion to the extent that it purports to disallow consideration of the concepts of sentencing entrapment, sentencing manipulation, and sentencing escalation. However, I believe that the core tenet espoused by the majority—that a defendant's so-called "altered intent" may constitute an objective and verifiable factor that may be considered in departing from a statutorily mandated minimum sentence—is directly contrary to the principles this Court so recently reaffirmed in *People v Babcock,* 469 Mich 247; 666 NW2d 231 (2003). Accordingly, although I concur in the majority's

decision to remand for resentencing, I dissent from its analysis.[1]

I. CONSIDERATION OF POLICE CONDUCT

Although the majority states that police misconduct, standing alone, is not an appropriate factor to consider at sentencing, it nevertheless allows consideration of any police conduct that can be "objectively and verifiably shown" to have "altered a defendant's intent." *Ante* at 1-2. I believe that this is an internally inconsistent holding and that it constitutes an expansion of the substantive defense of entrapment, a judicially created defense that I believe is violative of the doctrine of separation of powers and therefore invalid for the reasons expressed by Chief Justice CORRIGAN in her dissenting statement in *People v Maffett*[2] and her opinion dissenting in part in the instant case. Not only does the majority's holding permit the inappropriate extrapolation of the substantive entrapment defense into the sentencing context, it *broadens* the defense in that (1) it permits (indeed, it

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[1] In addition, I concur in footnote 14 of the majority's opinion, *ante* at 18, and agree that Michigan's sentencing system is unaffected by the holding in *Blakely v Washington*, 542 US ___; 124 S Ct ___; ___ L Ed 2d ___ (2004).

[2] 464 Mich 878 (2001).

requires) application of a subjective, rather than objective, assessment of the defendant's response to police conduct, and (2) it does not even require *impermissible* or *reprehensible* police conduct, the hallmark of the traditional entrapment defense.[3] Moreover, I agree with Chief Justice CORRIGAN that the rejection of a legislatively mandated sentence requirement based on a court's ad hoc assessment of police conduct impermissibly usurps both legislative and executive authority. See *post* at 6-8.

II. INTENT IS NOT AN "OBJECTIVE" FACTOR

Under former MCL 333.7401(4), a departure from the statutorily mandated minimum ten-year sentence applicable to defendant is permitted if the court has a "substantial and compelling reason" for the departure. In *Babcock, supra*, this Court adopted and reaffirmed, as an animating construction of the legislative sentencing guidelines, the *People v Fields*[4] definition of "substantial and compelling reason": a reason that is both objective and verifiable and that "'keenly'" or "'irresistibly'" grabs the court's

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[3] Michigan's objective entrapment defense requires a showing that either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002).

[4] 448 Mich 58; 528 NW2d 176 (1995).

attention.[5] *Babcock, supra* at 257-258, quoting *Fields*, *supra* at 67.

The majority opines that a defendant's "enhanced intent," if it "can be shown in a manner that satisfies the requirements for a sentencing departure as outlined in *Babcock*," is a factor that may properly be considered in departing from a mandatory minimum sentence. Although the majority does not dispute that intent is inherently *subjective*, it nevertheless holds that intent, if "*shown*" or "*established*" in "an objective and verifiable way," becomes a proper factor for consideration under *Babcock*. *Ante* at 12, 15-16. Thus, the majority presents two hypothetical examples in which evidence, other than the defendant's own representations as to his intent, is presented to support the defendant's claim that his intent was altered before or after he committed a crime; under such circumstances, the majority holds, the defendant's intent has been objectively and verifiably shown.[6] *Id*.

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[5] In turn, the *Fields* Court adopted the test for "substantial and compelling" as announced by our Court of Appeals in *People v Hill*, 192 Mich App 102; 480 NW2d 913 (1991). See *Fields, supra* at 62.

[6] The examples proffered by the majority aptly illustrate the inconsistency of its holding. Consider the first example, in which there is evidence that a defendant sells more of an illegal substance than he was initially prone to sell because the buyer has pleaded for more. *Ante*

The primary flaw in the majority's analysis, in my view, is that it conflates the separate *Babcock* requirements of objectivity and verifiability into a single *evidentiary* requirement. Again, *Babcock* requires that the *factor itself* be both objective and verifiable. The majority, however, takes the view that if there is an objective and verifiable *showing* of the existence of a factor, *Babcock* is satisfied. I disagree.

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at 15. It is entirely beyond me how such evidence demonstrates that the defendant's intent was "altered" by external factors. Rather, the defendant, at the time he committed the offense, *intended* to sell whatever amount of the illegal substance he, in fact, sold; the buyer's pleas simply provided a *motivation* for the defendant's decision to commit the crime of selling a larger amount. Under the majority's view, the defendant's presentation of a videotape depicting him reluctantly pulling the trigger of a gun and killing a victim in response to an accomplice's urgings would presumably support a downward departure from a mandatory sentence or from the sentencing guidelines range. I cannot subscribe to such an extreme view.

In the second example proffered by the majority there is evidence that the defendant, after assaulting the victim, secures medical assistance. *Ante* at 16. I am at a loss to understand how this evidence of the defendant's *post-crime* behavior demonstrates that his intent in committing the crime was altered. Again, as in the prior example, the defendant intended to do precisely what he did at the time he committed the crime. Rather, this example seems to approve of sentencing consideration of *remorse*, a factor that the *Fields* Court specifically held lacked objectivity. *Fields*, *supra* at 80. Moreover, the fact that a defendant dials 911 after slashing a victim's throat would certainly not "keenly" or "irresistibly" grab this writer's attention.

A subjective factor such as intent is not somehow transformed into an objective factor simply because it can be supported by evidence other than the defendant's own representations. Although the existence of such external evidence might well render a particular factor *verifiable*, an otherwise subjective factor will remain subjective, even in the face of a mountain of proof.[7] The adoption of the *Fields/Babcock* test was intended to preclude consideration of such subjective factors. I cannot subscribe to the majority's sub silentio repudiation of the *Babcock* requirement of objectivity.

Accordingly, on remand, I would preclude the trial court from considering as a proper sentencing factor defendant's intent.

Robert P. Young, Jr.
Maura D. Corrigan

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[7] **For example, much like intent, a defendant's *remorse* is a subjective state-of-mind factor that may not be properly considered at sentencing. See *Fields, supra* at 80. Remorse would not be somehow transformed into a proper sentencing factor by virtue of tangible or otherwise external evidence, such as testimony that the defendant cries himself to sleep every night or that he wrote apologetic letters to the victim's family. In such a case, the remorse would be *verifiable*, but it would not be *objective*.**

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v **No. 122696**

DEON LAMONT CLAYPOOL,

Defendant-Appellee.

KELLY, J. (*concurring in part and dissenting in part*).

I agree with Justice Cavanagh's concurrence. However, I do not believe the Court should take a position on the application of *Blakely v Washington*[1] to Michigan's sentencing scheme. The issue was neither raised nor briefed in this case. It is a jurisprudentially significant issue. I would not decide it without full briefing and oral argument.

Marilyn Kelly

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[1] **542 US ___; 124 S Ct ___; ___ L Ed 2d ___ (2004).**